No. 97-500 SEP 15 1997

In The OFFICE OF THE CLERK

Supreme Court of The United States

October Term, 1997

RICHARD ZELMA individually and on behalf of SHAWNE L. for the appointment of a guardian ad litem,

Petitioners,

ANDREW LEVINE, *Plaintiff,*

- against -

DONNA McLEOD, INDIVIDUALLY OR AS A STATE ACTOR; COUNTY OF WESTCHESTER; OFFICE OF THE DEPARTMENT OF SOCIAL SERVICES OF WESTCHESTER COUNTY; OFFICE OF CHILD PROTECTIVE SERVICES OF OSSINING, NY; OFFICES OF THE COUNTY ATTORNEYS OF WESTCHESTER, NY; ATTORNEY GENERAL OF THE STATE OF NEW YORK; JEWISH COMMUNITY SERVICES; MS. MARIA JOY FRANK, INDIVIDUALLY OR AS A STATE EMPLOYEE; HONORABLE ORAZIO BELLANTONI, NOMINALLY IN HIS CAPACITY AS FAMILY COURT JUDGE OF WESTCHESTER COUNTY; HONORABLE VINCENT COLABELLA, NOMINALLY IN HIS CAPACITY AS A SUPREME COURT JUDGE OF THE STATE OF NEW YORK; HONORABLE CHESTER DAVIS, NOMINALLY IN HIS CAPACITY AS A JUDGE OF THE DISTRICT COURT OF COUNTY OF FORSYTH; AND DOES 1 THROUGH 25,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (5331)

QUESTIONS PRESENTED FOR REVIEW

(1) Was it proper for the Court of Appeal to label petitioners reliance on the existing law as promulgated by the Supreme Court from 1992 to 1997, a "meaningless" defense to the issue of sanctions?

(2) In this case, were the child and biological father third-party beneficiaries to the contract between the Federal and State government, which created the right for "investigation and prosecution" of the perpetrator upon notice, under ¶ 1983? [42 USC 5106a(b)(2) & 5106c(b)(1) & 5106 g (7)B)].

(3) Was it proper for the Court of Appeal to refuse to consider the ruling of this court on April 21st 1997 entitled Blessing v Freestone, as well as other new circuit courts and district court opinions, recognizing original jurisdiction in the federal court and a viable cause of action under ¶ 1983, when it imposed sanctions upon petitioner ?

(4) Did Ankenbrandt v Richards change the domestic-relations exception doctrine from discretionary abstention to mandatory statutory divestment, and limited its divestment to the rendering of three decrees, which thereby raised original jurisdiction in the case at hand?

(5) Is it error of law to dismiss the complaint with prejudice on behalf of the child, when she was properly brought to the federal court's attention in 1992, and when her rights could never be abandoned by the biological father thereafter?

(6) Is it error of law for the federal court to rule that custody was awarded to the mother of child by the State court when no such finding was made by highest court of the State?

(7) Did the district court and appellate court error in concluding that there was no dispute to the underlying facts, and in refusing to appoint a guardian ad litem on the child's behalf from June 1992- June of 1997?

(8) Did the district court and Court of Appeal error, in not acknowledging that there was state action from the restraining orders which respondents obtained from December 1st 1986 and onward, which restrained the biological father of access to the subject child and created the dangerous environment that led to the child's rape thereafter? Is this not actionable under ¶ 1983, as a result of constitutional and federal statutory claims, when a policy of inaction was improvised by the defendants from December 7th 1987 and onward, by virtue that the defendants assumed legal responsibility for the child's welfare after December 1st 1986 and had a conflict of interest, as they were responsible for the injuries which took place from December 2nd 1986-August of 1987?

RULE 24.1 STATEMENT

Pursuant to Rule 24.1 of the Rules of this Court, all of the parties whose judgment is sought to be reviewed, are listed in the caption.

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In The
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Richard Zelma individually and on behalf of Shawne L. for the appointment of a guardian ad litem ,

Petitioners

Andrew Levine, Plaintiff

v.

Donna McLeod and the County of Westchester, et.al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Richard Zelma respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on June 3, 1997.

OPINIONS BELOW

The decision of the United States District Court for the Southern District of New York is reported at 164 F.R.D. 372 (S.D.N.Y. 1996) and is reproduced in full in the appendix. ["A" 16-26]. The Second Circuit Court of Appeals decision dated June 3rd 1997 is unpublished. ["A" 3-4]. The petition for a rehearing was denied on June 18th 1997. ["A" 2]. Prior decisions of import is that the final

judgment of the Court of Appeals was entered on March 2nd 1994. ["A" 30-33]. The circuit court had affirmed the dismissal of the complaint. [*Levine* v *County of Westchester*, 828 F. Supp. 238 (1993)].

BASIS FOR JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes and constitutional provisions are set forth in the Appendix. ["A" 92-98]. [1] The statutes are: 42 U.S.C. ¶ 1983; FRCP 11; 42 U.S. C. ¶ 5106a(b)(2); 5106a (e); 5106c (b)(1); & 5106g 6 & 7 (B); Family Law Act 1032 and 1034. The constitutional provisions are: Article III Sec. 2 ; 10th and 11th and 14th Amendments of the United States Constitution; Article I Sec. 8 Cl. 1 and Cl. 18 of the United States Constitution.

STATEMENT OF THE CASE

(i) The petition is timely

This federal civil rights case was filed on July 8th 1992 by petitioner, on behalf of the plaintiff Mr. Levine, and his biological daughter Shawne. The ramifications of this complaint led to the finding of sanctions against petitioner. Petitioner has at all times made certain to comply with the rulings of this court. The rulings in Ankenbrandt and Blessing are very important as they raise the principle that there was proper original subject matter jurisdiction based upon the federal statutes passed by Congress in the field of domestic relations. In addition, the facts alleged are fully

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[1] "A" with no asterisk refers to the appendix in support of this petition for certiorari. "C" refers to the July 8th 1992 complaint. App.* refers to the appendix in the record that was presented to the Circuit Court in 1997. [index # 96-7747]. App. ** refers to the record of the initial appeal of 1993-1994. [index # 93-7803].

supported by admissible evidence; the Federal Rules of Evidence; and firmly established evidentiary principles as set forth by the judiciary. This petition will raise the underlying point that the complaint signed on July 8th 1992 raised causes of actions under ¶ 1983. It was predicated upon the "existing law" at that very time.

The July 8th 1992 complaint was dismissed on July 30th 1993. [*Levine* v *County of Westchester*, 828 F. Supp. 238 (1993)]. The decision of the Court of Appeals affirming the dismissal was entered on March 2nd 1994. ["A" 30-33 ; unpublished]. The motion for a rehearing was denied on May 10th 1994. The petition for certiorari was due on August 8th 1994. What is crucial to note is that the first appeal was not perfected to this court as the biological father abandoned the case on July 15th 1994. It was prepared but not perfected. [App.* 316-356]. The abandonment was made known to a third-party, ["A"61-64]; and admitted in open court before the district court judge on May 5th 1995. [App*. 117]. At all times beforehand, Mr. Levine strongly supported the federal complaint and appeal on behalf of himself and his child Shawne. [see "A" 65-66]. It was only after the abandonment of the case by Mr. Levine that the motion for sanctions was deliberated and addressed by the district court in 1995-1996.

What is factually crucial is that the biological father has not seen his child by virtue of court orders of restraints which he abided by, since December 1st 1986. He was charged with rape and all lesser included charges by appellee McLeod, on January 17th 1987. [App.** 634]. Rape is medically impossible to attribute to the biological father. And, the criminal charges were dropped after the grand jury refused to indict the biological father on March 6th 1987. ["A" 67; App*. 426]. Yet the civil proceeding under Article 10 of the Family Law Act, led to drastic results to each of the plaintiffs that were brought to the federal court's attention in 1992. Those proceedings are funded by Congress. [42 U.S.C. 5106a(b) (2) & 5106c (b)(1); " A" 94-95]. That proceeding only concerned itself with alleged conduct taking place before December 1st 1986.

["C" ¶ 37 at App. * 151-- Bill of Particulars]. And, it was the child's stepfather that was living with her from December 2d 1986-August of 1987, who is the likely perpetrator to the crime of rape and all lesser included charges of sexual abuse.[2]

This petition seeks to address first and foremost the finding of sanctions. This is the direct issue raised on appeal. However, it is and was maintained that the underlying merits to the entire complaint, was predicated upon the existing law as of July 8th 1992, as set forth by this court, and by the statutory rights passed by Congress under the Child Abuse Prevention and Treatment Act. ["CAPTA"]. Here lies the original jurisdiction provided for under ¶ 42 USC ¶ 1983 and 28 USC ¶ 1343. The third amended complaint filed on July 8th 1992, was specifically done with permission of the district court on June 9th 1992, after a lengthy discussion of the oral argument by this court in Ankenbrandt of March 31st 1992, which was published by USLW on April 7th 1992. [*infra* Point I (B); " A". 39-51].

At all times, petitioner has maintained that this court made clear that Congress has the power to pass statutes in the field of domestic relations, without being hindered to do so by the domestic relations exception doctrine and or the 10th amendment. [*Ankenbrandt* v *Richards*, 504 U.S. 689 (1992); *infra* Argument Point I (A)]. At all times, petitioner has argued that this court did not change and or overrule the test of *Wilder* and *Wright* when it rendered *Suter* 1992. [*Suter* v *Artist M* , 503 U.S. 347, at 356 n. 8 & 361 n. 12 (1992) ; also see i.e. *U.S.* v *Ursery*, 116 S. Ct. 2135, at 2147 (1996)].[3] Petitioner furthermore "cautiously" argued

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[2] The case of Doran is of significant import, as Mr. Levine's obeying court orders of restraint gave him standing to file the ¶ 1983 complaint. The divorce case " must of necessity be subordinated to the claims of federalism in this particular area of law." [see *Doran* v *Salem Inc.*, 422 U.S. 922, 928 (1975) citing *Steffel* v *Thompson*, 415 U.S. 452, 455-56 (1974)]. Petitioner conditioned the representation of Mr. Levine upon his compliance with the court orders of restraint.[App*. 456-457]

[3] See main brief page 60 dated November 2d 1993; see petition for re-

on October 6th 1996, ["A" 11], that this court will rule that private parties have standing to file a complaint in federal court under ¶ 1983 in domestic relations, and that this will be done without any overruling of former judicial precedent. Appellants point proved to be correct on April 21st 1997. [*Blessing* v *Freestone*, 117 S. Ct. 1353, (1997)]. [4]

These points are the core of the defense for sanctions. If correct, then the complaint and appeal from 1993- 1994 was predicated upon existing law. This is an affirmative defense under FRCP 11.[5] The "existing law" doctrine has long been recognized by this court and applies under FRCP 11. ["A" 96-97]. [6] The principle for a court

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hearing page 12 dated March 22nd 1994; see memorandum of law to district court dated September 24th 1992 at App.** 772 quoting *Suter* v *Artist M*, 112 S. Ct. 1360 at 1367 n. 8 (1992); see main brief dated January 21st 1997 page 38].

[4] The oral argument in *Blessing* was made part of the transcript below. [App*. 547- 602]. Petitioner witnessed this on January 6th 1997, and it was relied on numerous occasions in the main and reply briefs of January 21st and February 10th 1997. [Main brief dated January 21st 1997 page 37 footnote 19; also see pages 4 & 5; page 12 footnote 9; page 23 on two occasions; page 39 relying on *amicus curiae* brief of United States in Blessing; page 41 footnote 23; page 45 footnote 24; page 50; page 57; Reply Brief page 3; page 4; Point II pages 5-8;].

[5] The June 18th 1997 order denying the motion for a re-hearing, admitted that it was mistaken in striking the brief because it was 58 pages. ["A" 2 and "A" 6]. The Court of Appeal then shifted its position and ruled that it was striking the brief as a result of an improper font. ["A" 2]. The reply brief is attached to the appendix as a sample to demonstrate that the font was proper and that striking it from the record was incorrect. The 11 point font is permitted under FRAP 32 (a) and this specific format was approved by the case manager, and was accepted in the prior appeal by this same court. The points raised therein are indeed "meaningful" to the questions of sanctions as it is predicated upon existing law that was never changed. [FRCP 11].

[6] Similarly, as raised in the main brief to the Court of Appeal on January 21st 1997: " *The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.*" [*Bernhard* v *Bank of America*, 19 Cal.2d 807, at 809 (1942) Tobriner J. citing Black, Judgment (2d ed, sec. 549; 35 Yale L.J. 607,608; 34 C.J. 973, 1010 1012; 15 R.C.L. 1016; 30 Am. Jur

to "obey" existing law was by Chief Judge Marshall. [*United States*, v *Schooner Peggy*, 1 Cranch 103, at 110, 5 U.S. 103; 2 L. Ed. 118, (1801)]. Furthermore, the "law of the case" doctrine does not bar this court nor the Court of Appeal of its power to change the disposition of a prior decision. [*Messenger* v *Anderson*, 225 U.S. 436, 444 (1912) Holmes J.; see reply brief at "A" 76 Point I].

This courts ruling in *Blessing* was rendered when the matter was "pending" . It must be applied by the Circuit Court. [see i.e *Papenthien* v *Papenthien*, __ F. 3rd __; 1997 WL 414251; 97 D.A.R. 9503, at 9504 (CA9) (1997); citing *Rush* v *Obledo*, 756 F. 2d 713, 725 (CA9 1985)]. The lower court's judgment cannot prevail.

(ii) Facts underlying the appeal.

The child's biological father has been restrained by court orders from seeing his natural daughter Shawne, since December 1st 1986. The child's hymen was found to be intact on December 2nd 1986. ["C" 4, at App.* 144]. He has at all times obeyed this restraint. Respondent McLeod admitted that Mr. Levine did not see the child after December 1st 1986. [App. * 248 ¶ 15 affidavit of Ms. McLeod dated July 28th 1992]. "Rape" is a medical impossible event to have occurred before December 1st 1986. [42 USC 5106 g (7) (B)]. On July 10th 1987, the plaintiff child Shawne, testified that a " daddy" " inserted his penis inside of me and it hurt". She testified to this when " questioned by the law guardian".["C" § 44 at "App.* 153]. In addition, the child testified that " she did not believe her mommie that her daddy was mean to her" before the " Thanksgiving weekend of 1986". ["C" 43, at "App.* 153]. Furthermore, on April 27th 1987, Ms. Frank, the former law guardian, visited the child's environment. The child was so scared of a "daddy" that she "locked the door to her own bedroom door so that her father could not get in." ["C" ¶ 28 at App.* 149-150].

Mr. Belvedere Esq., submitted several affidavits

Judgments ¶¶ 219-246 "; see main brief January 21st 1997 pages 12-13 ft. note 9].

stating that at no time did the child ever identify anyone by name at the in camera hearing of July 10th 1987. ["A" 52-56]. [7] On July 10th 1987, immediately after the in camera hearing, Ms. Frank, admitted that the "child" "was somewhat vague". [App.* 267]. The Family Court judge never indicated or suggested that the child identified anyone by name at the in camera hearing. [App.* 37-51].

Petitioner obtained evidence of facts that took place after the restraining order of December 1st 1986. When one links that evidence to what was transcribed at the Article 10 hearing, it is very clear that the child was healthy before the governments intervention and that all of the abuse only took place afterwards. None of the evidence obtained from the transcript of the Family Court hearing is " privileged" . [New York Family Court Act ¶ 1046 a (vii); see *People* v *Sinski*, 88 NY 2nd 487 (1996)]. The evidence from the initial hearing is admissible in a second and separate hearing regarding another individual. [see i.e.*U.S.* v *Felix* , 503 U.S. 378 at 385-86; (1993); *Schiro* v *Farely*, 510 U.S. 222, at 232,233 (1994) *Ashe* v *Swenson*, 397 U.S. 436 (1970); see App.* 338]. Furthermore, it is admissible as a hearsay exception. [FRE 803 (6) & (8) and (24)]. All of that evidence together with the corroborating clinical medical professional opinions of Drs.' Sgroi and Green are not privileged under FRE 501. [see *Jaffee* v *Redmond*, 116 S. Ct. 1923 (1996); FRE 701; also see i.e. *In re Tabatha G.*, 53 Cal. Rptr. 2d 93, at 98- 99, 45 Cal. App. 4th 1159 (1996), citing *People* v *Cabral*, 12 Cal. App. 4th 820, 826-828 (1991)].

The pattern of sexual abuse commencing mildly; progressing to physical abuse; with it culminating in rape; is " predictable". [Sgroi *infra* "C" 71, at App.* 159]. The evidence is admissible to prove that the uncharged conduct of rape, did take place after December 2nd 1986 . As the California Supreme Court has set forth:

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[7] The Appellate Division State of New York denied petitioners motion to obtain a copy of the in camera hearing on July 14th 1988. ["A" 37]. Prior to filing the complaint, petitioner made several phone calls to Mr. Belvedere Esq. respecting the in camera hearing. ["A" 52-56.].

' " The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant, to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." ' [See *People* v *Ewoldt 7 Cal. 4th 380 at 403* citing *People* v *Miller,* 50 Cal. 3d 954, 987, (1990)]. "**The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.**" '[emphasis added *id.* citing **McCormick on Evidence** 4th Ed. 1992 § 190 pp. 801-803,].

The systematic course of abuse is distinct in its nature. The breaking of the hymeneal ring is the **"earmark signature"**. [*Ewoldt, id.*, 7 Cal. 4th 380, at 403 (1990); also see *Ewoldt, supra,* at 393-394, n. 2 citing *2 Wigmore Evidence (Chadbourn* rev. ed. 1979) § 304 p. 249]. The uncharged offense of rape establishes "that the charged offenses are manifestations of a common design or plan." [*Ewoldt*, supra at 399 citing 2 Wigmore *supra* ¶ 304, p. 249; contra, 1 McCormick on Evidence (4th ed. 1992), ¶ 190, pp. 800-801; Imwinkelried, Uncharged Misconduct Evidence (1984) ¶ 3.23, p. 61]. The evidence of rape exculpates the biological father from all lesser included charges . [See i.e *People* v *Gordon*, 165 Cal. App. 3d 839, 864 (1985); *People* v *Callan,* 174 Cal. App. 3d 1101, at 1112 (1985)].

Further, the hospital record of December 26th 1986, and the arrest of the same person on July 2nd 1987, is admissible, to demonstrate the **identity** of a person who had access to the child after December 1st 1986, and who could easily be identified as a "daddy" by a child of 5 years. [App.* 233 (a) and (b) & 234-238; See *Ewoldt, id.* (1994)]. The nurses witnessing the abuse on December 26th 1986 is objective eyewitness evidence establishing the "accidental disclosure" that Dr. Sgori speaks of.["C" ¶ 71 *at* "A" 160.]. The medical clinical findings of Dr. Sgroi are admissible. [*Daubert* v *Merrell Dow*, 509 U.S. 579, at 593-

594, (1993); " C" ¶ 70 at App* 158, see *Matter of Nicole V*, 71 NY 2d 112, at 121 (1989) citing Handbook of Clinical Intervention in Child Sexual Abuse, by Dr. Sgroi, (1982) FRE 702 & 803 (18) and (24)].

The clinical findings make clear that the classic and or "predictable" form of modus operandi by a perpetrator is to commence the sexual abuse in a " mild" fashion; have it change to " physical "abuse"; with it ending in " vaginal penetration" if the victim is a female.["C" ¶ 71 App.* 158-160]. The imposition of a " secret" upon the child is predictable.[*id*]. The alliance by a mother with the perpetrator has too been found to be foreseeable. Dr. Arthur Green's affidavits of December 3rd 1987 and June 14th 1988 made clear that it was imperative for the County to investigate whether the case was one of " mistaken identity" and time. [App*. 269-287]. He made clear that stepfathers are far more likely to abuse a child than a biological father. [App.* 273-274 ¶ 14]. He made clear that if the premise of mistaken identity holds to be accurate, then ignoring this would significantly increase the harm to the child and biological father.[App *285 ¶ 33 & 278 ¶ 10 and 274 ¶ 19].

The facts have full evidentiary support. This is a further complete defense under FRCP 11. [see FRCP 11 (b) (3) as amended 1993, "A" 96-97].

(iii) The basis for original jurisdiction. Conflict between the Appellate Division of the State of New York and the Court of Appeal of the Second Circuit.

The legally "new evidence" was obtained by petitioner in November of 1987 and submitted to the court and served upon all parties on December 7th 1987. [8] [App. * 233(a) (b) & 234-237]. It was new for the dispositonal

[8] Exclusive of the officials from North Carolina. They were served in 1991. Petitioner became the attorney of record on December 7th 1987. Petitioner was residing in California and was asked by Mr. Levine to assist him in this matter for the dispositional hearing. That took place sometime in September or October of 1987.

hearing but not legally new for the fact-finding hearing which ended on July 10th 1987. On May 22nd 1989, the Appellate Division Second Department of the State of New York separated the three orders appealed. It is unprecedented to be able to appeal all three orders on a separate basis. [see "C" 52 App.* 154, citing *Matter of Erin*, 139 A.D. 2d 737 (1988); *Matter of Linda K.*, 132 A.D. 2d 149 (1987); and *Matter of Suffolk County*, 83 NY 2d 178 (1994)]. Unlike the Family Court, the Appellate Division did not grant "custody and care" to appellee, rather it "release[d]" her to the mother. ["A" 34-36; see *Matter of George C.*, 122 A.D. 2d 943, 944 (2d. Dept') (1986)]. In separating the orders from each other, the Appellate Division "impugned" the finding of the Family Court. [see i.e *Heck* v *Humphrey*, 512 U.S. 477 at 489 (1994) Scalia J. also see *Haring* v *Prosise*, 462 U.S. 306 at 314 n. 6 (1983) quoting *Union & Planters' Board* v *Memphis*, 189 U.S. 71, 75 (1903)]. The Court of Appeals of New York denied the petition for leave to appeal on July 13th 1989. [*In the Matter of Shaune Levine*, docket # N-112-87, Mo. No. 738, unreported]. It did so based upon the findings that were made by the Appellate Division. Pursuant to CPLR 5712:

> " Factual activity by the Appellate Division may be important for the Court of Appeals to know regardless of the label the Appellate Division gives to the disposition." [Mckinneys CPLR 5712 at page 633].

In the federal case, the trial court granted defendants motion to dismiss on July 30th 1993. [*Levine* v *County of Westchester*, 828 F. Supp. 238 (1993)]. It found that Ankenbrandt has no relevancy to the case at bar as it was limited to diversity disputes. [*id.* at 238, ft. note 3 (1993)]. At oral argument, the trial judge stated on the record that 42 USC 5106a(b)(2) " is not a federal statute" [App.** 731 line 13 and or App.* 71]. On appeal, the Second Circuit on March 2nd 1994, affirmed the dismissal. It exclusively relied on the Rooker/Feldman doctrine and found that "custody" was awarded to defendant McLeod by the State Court. [A. 30-33].

This is crucial. The law of the case was specifically set forth on the face of the complaint. [**"C" at 52 "A" 154**]. [9] No federal complaint would have been filed but for the change of law by the Appellate Division Second Dep't on May 22nd 1989. The complaint was filed before any parent had custody of the child. The State divorce court has no subject or personal jurisdiction over the question of ¶ 1983; negligence; or the County of Westchester. [*Medlin* v *Boeing Vedrtol Co.*, 620 F. 2d 957, 960 (3d Cir. 1980). This is even if the County would consent. [*National Union Fire Ins. Co.*, v *Stites Prof. Law Corp.*, 235 Cal. App. 3d 1718, at 1723-24 (1991)]. To lose on the limited issue of custody in the divorce court would preclude any remedial course thereafter under the issue and claim preclusion doctrine. [*University of Tennessee* v *Elliot*, 478 U.S. 788, 799 (1986) Scalia J.]. To rely on this matter being a state case, is a "mistake" similar to the one found by this court previously in another matter. [*Golden State Transit Corp.* v *Los Angeles*, 493 U.S. 103, at 108 ft. note 5 (1989); Stevens J.].

> " Federal courts may '" not employ their own rules... in determining the effect of state judgments"' but must '" accept the rules chosen by the State from which the judgment is taken." [*Matsushita Electric Industrial Co.* v *Epstein* 116 S. Ct. 873, 877-880 (1996) Thomas J. quoting *Kremer* v *Chemical Constr. Corp.*, 456 U. S. 461, 481-482 (1982)].

As spelled out by this court:

> " Within that hierarchy, <u>the decision of an inferior court is not</u> (unless the time for appeal has expired) <u>the final word of the department as a whole.</u>" "It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment." (citation omitted)"... " Having achieved

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[9] The Article 10 proceeding furthermore, does not embrace the issue of "custody". This was admitted by the attorneys representing the Dep't of Social Services of Westchester County. [see i.e. affirmation of Mr. Graves Esq. ¶ 8 dated March 19th 1987 at "A" 57-60].

finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy." [emphasis added see *Plaut* v *Spendthrift Farm Inc.*, Scalia J. 514 U.S. 211, at 227 (1995)].

Here lies a drastic error, and conflict, between the highest state court and the Court of Appeal.

This is not a Rooker/Feldman case either. It is not "inextricably intertwined" with a hearing concerning itself to a time frame period having no relevancy to the issue of rape. [see i.e *Mullins* v *State of Oregon*, 57 F. 3d. 789, at 792-793 (CA9) (1995) citing *Dubinka* v *Judges of Superior Court*, 23 F. 3d 218, at 222 (CA9) (1995) and *District of Columbia Court of Appeals* v *Feldman*, 460 U.S. 462, at 486-488 (1983)]. In no fashion is there any suggestion in any document submitted to the federal court as of 1992, that there was a cause of action for the prosecution of Mr. Levine to the time period before December 1st 1986. [see i.e. *Buckley* v *Fitzimmons*, 509 U.S. 259; (1993); *Burns* v *Reed*, 500 U.S. 478 (1991); cf. *Imbler* v *Pachtman*, 424 U.S. 409, at 413 (1976)].

It was essential to file the ¶ 1983 complaint in 1992 in order to preserve the rights of the plaintiffs. The knowledge imputed from the evidence is fundamental to any statute of limitation issue. The continuous 18 month duty of the defendants only expired on June 4th 1989, and no claim could have been filed prior to that time. The three years expired on June 4th 1992. [see i.e. *Kronos Inc.* v *AVX Corp.*, 81 N.Y. 2d 90, at 96 (1993) & *Owens* v *O'kure*, 488 U.S. 235, 238 (1989); *Bagley* v *C.M.C. Realty*, 923 F. 2d (CA9) (1991); *Brummet* v *Camble*, 946 F. 2d 1178, 1184 (CA5) (1991)]. The most recent cases from the states highest courts across the nation, reject the tolling of the statute of limitations in the field of child abuse. [see *Lemmerman* v *Fealk*, 449 Mich. 56, at 80; 534 NW 2d 695, 705 (1995); also see *S.V.* v *R.V.* 933 S.W. 2d 1 (1996) Texas Supreme Court ; see *Tyson* v *Tyson, 107 Wash. 2d 72*, at 76; 727 P. 2d 226 at 228, (Wash. Supreme Ct. 1986) cited by *Lemmerman* v *Fealk*, *supra* 449 Mich. 56 at 74].

There was proper original subject matter jurisdiction in the case at bar.

> " The jurisdictional provision governing section 1983--28 United States Code section 1343--confers 'original jurisdiction' on the federal district courts. The phrase '**original jurisdiction**' means the power to entertain cases in the **first instance**, as **distinguished from appellate jurisdiction.**"

[See *Brown* v *Pitchess*, 13 Cal. 3d 446, at 521,(1975)].

The Second Circuit on March 2d 1994, further found that the appeal was "frivolous" pursuant to FRAP 38. The district court was bound by this finding. It found that (1): sanctions were only to be imposed upon petitioner as the Court of Appeal had so found *sub silentio* on March 2d 1994 [" A" 25 ft. note 6]; (2): that the "underlying facts" of the case are undisputed ["A" 25]; (3): that McLeod was not a properly named defendant and that it was immaterial if the other 5 parties were properly named or not ["A" 22]; (4): that it was further deplorable conduct for petitioner to inform the court of new case precedents from the leading State tribunals, and other district and circuit courts, together with Congressional hearings, establishing private causes of actions under ¶ 1983; [" A" 19 see i.e. App*. 497-520 setting forth *Jeanine B* v *Thompson*, 877 F. Supp. 1268, at 1285-86 (1995) (Reynolds D.J.; E.D. Wis.]; (5): that the order granting petitioner's motion to withdraw was dated November 29th 1994;["A" 19]; (6): that the defense sought to "extend and or modify" the law, not that it was predicated upon "existing law" ["A" 20]; and that (7): the complaint and appeal attempted to have the federal court review "state court decisions". ["A" 21-22]. Each of these principles are in error.

Both the District Court and Circuit Court continue to ignore the first and foremost issue in the case at bar. There was original subject matter jurisdiction as a result of Congress passing the Child Abuse Prevention and Treatment Act. That statute amended in 1988 and 1992, fulfilled the tests as set forth by this court from Maine; to Wilder; to Wright to Suter; and to Blessing. There is no internal

remedy as the Sea Clammers case sets forth. This case is far stronger than Ankenbrandt and Blessing as will be revealed. In the present case, the issue is first and foremost whether a cause of action was properly set forth under ¶ 1983 as a result of Congressional statutes. [Point I & II *infra*]. The answer to this prevailing question is in the affirmative. If that is correct, any other rational as set forth by either the district court and circuit court are clearly in error.

REASONS FOR GRANTING THE WRIT.

I. A. *There was always original subject matter jurisdiction. The type of domestic relations exception doctrine set forth in Ankenbrandt is important. It mandates judicial review of the causes of actions alleged in the present case.*

The District Court in Ankenbrandt dismissed the case by virtue of the domestic relations exception doctrine. Jurisdiction was denied by " basic principles of comity," which " **compels this Court to apply its discretion declining** the exercise of jurisdiction in the instant matter." [emphasis added App. ** 829, at 830, 1990 WL 211545 (E.D. La.) Arceneaux, D.J.]. That District Court primarily relied on *Ex Parte Burrus* . [136 U.S. 586, 594 (1890)].

This court reinstated the complaint. It changed the discretionary abstention doctrine to one of mandatory divestment limited to the rendering the three decrees of "divorce, alimony, and child custody." [*id* . at 703].10 In

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10 The only exceptions to the doctrine of jurisdictional divestment is when the party is an Ambassador to the United States, and or is a citizen of Washington D.C. The first exception is by virtue that the Constitution gives the federal court original jurisdiction to "all Cases affecting Ambassadors, other public Ministers and Consuls." [Article III section 2 & see *Ohio ex. rel. Popovici* v *Agler*, 280 U.S. 379 (1930)]. The second exception is when a private citizen is a resident of Washington D.C. This is because Washington D.C. is not a state, and " 'there is no division of powers between the general and state

doing so, the court reviewed the history of the domestic relations exception doctrine. This court made clear that the exception doctrine was not predicated upon any provision of the Constitution, and that if there was an appropriate statute in this field, that there was a case and controversy under Article III. As this court made clear:

> " An examination of **Article III**, Barber itself, and our cases since Barber makes clear that **the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute** to the federal courts." [*Ankenbrandt v Richards,* 504 U.S. 689 at 695] ..... " We therefore have no difficulty concluding that when the Barber Court " ' disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, ' " , 21 How., at 584, **it was not basing its statement on the Constitution.**" [*id. emphasis added Ankenbrandt* at 697].

In concluding that the domestic relations exception doctrine was statutory and not linked to the Constitution, this Court gave Congress the inherent authority to bind States in this field of legislation.

> " When Congress attempts to directly regulate the States as States, the **Tenth Amendment** requires recognition that there are **attributes to sovereignty** attaching to every state government which **may not be impaired by Congress**, not because Congress lacks affirmative grant of legislative authority to reach the matter, **but because the Constitution prohibits it** from exercising the authority in that manner". [emphasis added see *Hodel* v *Virginia Surface Mining,* 452 U.S. 264, 286-287 (1980); "A" 93].

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governments." ' [see e.g. *Ankenbrandt supra* at 696, citing *Glidden Co.* v *Zdanok*, 370 U.S. 530, 581,n. 54 (1962) quoting *Kendall* v *United States, ex. rel Stokes,* 9 L. Ed. 1181, 12 Pet. 524 (1838)].

The 10th and 11th amendments are mirror images of each other. [emphasis added *New York* v *U.S.* 505 U.S. 144, at 156 (1992); "A" 93]. This court has made clear that the 11th amendment does not apply when Congress " abrogates its sovereign immunity by unmistakably clear language, or " if it intends to impose a condition on the grant of federal moneys." [*Will* v *Michigan Dep't of State Police,* 491 U.S. 58, at 65 (1989) citing *Pennhurst State School and Hospital* v *Halderman,* 451 U.S. 1, at 16 (1981). At all times petitioner's position was that: (1) naming the officials of the State was outside the scope of the 11th amendment and (2) to do so prospectively was and is permitted. [see *Welch* v *Texas Highways and Public Trans., Dept.*, 483 U.S. 468 at 488 (1987) Powell J., citing *Edelman* v *Jordan*, 415 U.S. 651 (1974); see *Hutto* v *Finney,* 437 U.S. 678 at 691 n. 17 (1978) citing *Milliken* v *Bradley*, 433 U.S. 267 at 290 (1977) ancillary costs not barred by 11th amendment].

Although there was disagreement between the type of abstention that was most appropriate, all 7 judges that took part in this case made clear that had there been a federal statute at issue, abstention would not be improper. [11]

Of crucial import, is that the *Burrus* case, rendered in 1890, was <u>not</u> a diversity case as each party lived in Nebraska. [*Burrus supra* at 587]. The Supreme Court in *Burrus* made clear that no prior case reviewed the diversity statute together with the issue of custody. This included the infamous *Barber* case that they ruled on in 1859, 29 years beforehand. [*Barber* v *Barber*, 21 How, 582, at 584 (1859)]. As the Supreme Court stated:

" But whether the diverse citizenship of parties

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[11] Honorable Justice Stevens and Thomas did not take part. [*Ankenbrandt v Richards,* 504 U.S. 689 at 717-718 (1992)]. The concurring opinion of Justice Blackmun stated that: " While petitioner's claims do no involve a federal question or statute-- the presence of which would strongly counsel against abstention." [*Ankenbrandt, supra* concurring opinion Blackmun J. at 717, citing *Colorado River Water Construction Dist.* v *United States*, 424 U.S. 800, at 815 n. 21 (1975)].

> contesting this right to the custody of the child, could, in the courts of the United States, give jurisdiction to those courts to determine that question, has never been decided by this court that we aware of it." [emphasis added *In re Burrus*, 136 U.S. 586 at 596 (1890)].

This court in Ankenbrandt specifically relied on *Burrus* for the new mandatory jurisdictional divestment doctrine to include decrees for child custody. [*Ankenbrandt supra* at 701-704 (1992)]. And as custody was never at issue in Barber, and the diversity statute itself was not at issue in Burrus, this court defined the domestic relations exception doctrine on a historical "judicial gloss" basis, rather than interpreting the language of the diversity statute itself.[see point I (B) *infra*]. It was the Congressional "acceptance" of the former case authority by way of "stare decisis" when they passed the amendment to the diversity statute in 1948, which permitted the Court to conclude that it was statutory. [*Ankenbrandt id.*at 700-701, citing *Patterson* v *McClean Credit Union*, 491 U.S. 164, 172-173 (1989); *Lorrilard* v *Pons*, 434 U.S. 575, 580 (1978)]. The domestic relations exception doctrine is not solely limited to diversity disputes. The key to the new statutory jurisdictional mandatory divestment doctrine is that the decree requested from the federal court cannot be divorce; alimony; or custody. As this court set forth:

> Ct: **Because** the allegations in the complaint **do not request** the District Court **to issue a divorce, alimony, or child custody decree,** we hold that the suit is appropriate for the exercise of ¶ 1332 jurisdiction given the existence of diverse citizenship between petitioner and respondents." [emphasis added *Ankenbrandt id.* at 706-707].

What was of import in *Burrus* and *Barber*, is that this Court adopted the dissenting opinion in *Barber* as its principle of law for our judiciary to follow. That point of law by the Barber dissent is set forth as follows:

> " The **origin** and the extent of the [the federal

courts'] jurisdiction **must be sought in the law of the United States, and in the settled rules and principles by which those laws have bound them.**" [emphasis added *Ankenbrandt , supra* at 699 quoting Barber at 605 Daniels J. dissenting].

The "law of the United States" is the Child Abuse Prevention and Treatment Act. The "principles" of law as rendered by this court from Maine; to Wilder; to Sea Clammers; and to Blessing; is binding. As was pointed out in the past:

> " It should go without saying that any decision of this Court has wide-ranging applications; nearly every opinion we issue has effects far beyond the particular case in which it issues". [*Harper* v *Virginia Hospital*, 509 U.S. 86; at 119 (1993), O'Conner, J.dissenting].

The rulings by lower courts have ignored the federal statute and failed to properly analyze Ankenbrandt . On July 30th 1993, the district court [Sprizzo J.], misapplied Ankenbrandt and ruled that " *since there is no complete diversity between Levine and all of the defendants herein, Ankenbrandt is clearly inapplicable*." [*Levine* v *County of Westchester*, 828 F. Supp. 238, at 242 n. 3 (1993)]. Moreover, the domestic relations exception doctrine does not review the language of the diversity statute and is not an " interpretation of the diversity statute ". [cf. i.e *Williams* v *Lambert*, 46 F. 3d 1275, at 1283 (CA2) (1995); see *infra* Point I (b)]. The Congressional acceptance in 1948 of this courts prior rulings were from a variety of cases, some of which had nothing to do with the diversity statute.

Ankenbrandt is not limited to diversity disputes. The discretionary abstention doctrine is no longer recognized. There was original subject matter jurisdiction predicated upon the federal statutes that created rights on behalf of the plaintiffs in the field of domestic relations. ["C" ¶'s 142-143, 168-176, at App*. 174, 177].

I B. ***The oral argument in Ankenbrandt fully supports original subject matter jurisdiction.***

The oral argument in Ankenbrandt of March 31st 1992, is crucial. [60 U.S.L.W. 3681. A 39-51]. The key points are set forth:

> Justice O'conner asked whether the exception is derived from the Constitution or is statutory. Could Congress change it? She queried? ["A" 45].
>
> Weidenfeld stated that he believed the exception goes back to the Tenth Amendment. ["A" 45] ["A" 93]
>
> Pursuing the issue, O'Conner demanded a yes-or-no answer to the question of whether Congress could direct federal courts to exercise jurisdiction in some domestic relations matters, such as parental kidnapping.....["A" 45] ["A" 92,93].
>
> Justice Blackmun sought clarification as to whether the discussion was really about abstention rather that a total exception. Are federal courts really not abstaining, he asked from hearing cases over which they actually may exercise jurisdiction? ....["A" 46].
>
> Blackmun: But isn't it dangerous to read into the Constitution an exception rather that the power of abstention? ...["A" 46] ["A" 92-93].

Justice Kennedy brought up an important concern of state court proceedings and there effects to disputes in federal court.

> Suppose, asked Justice Kennedy, that the mother was involved in Louisiana domestic proceedings, and the court found that there was no abuse? Wouldn't that, he suggested, lead to issue preclusion? ["A" 44].
>
> And the Chief Judge raised the premise that

interpreting the language to the diversity statute alone, without fully taking into consideration the history of the doctrine itself, may not necessarily be correct.

> "Rhenquist: This court has stated that when Congress reenacts a jurisdictional measure, it does so with knowledge of any judicial gloss on it. We have spoken about the domestic relations exception since the turn of the century, Isn't it rather two dimensional to claim that we should just look at the words of the statute? ["A" 43].

In all respects, petitioners reliance on the oral argument when discussed before Judge Sprizzo on June 9th 1992, was with merit. It was imperative to bar the prospective use of the finding of lesser included charges upon Mr. Levine by state officials and or appellee Mcleod. This is exactly what respondent was doing at that very time. [App. ** 316, affidavit of Ms. McLeod dated October 24th 1991]. She was using the finding of the lesser included charges and claiming that she was a plaintiff to the Article 10 state proceeding. The offensive use of collateral estoppel would have resulted in a decree of custody in the divorce proceeding in her favor, and would end any possibility for raising any rights on behalf of the child in the future. [*University of Tennessee* v *Elliot*, 478 U.S. 788, at 799, Scalia J. (1986)]. There was at all times proper original subject matter jurisdiction.

II. CONGRESS CREATED A RIGHT ENFORCEABLE UNDER ¶ 1983 UPON THEIR PASSAGE OF THE CHILD ABUSE PREVENTION AND TREATMENT ACT. [42 USC 5106a (B)(2)].

A. *The creation of this right can now be legally presumed.*[42 U.S.C. 5106c(b)(1)].

In 1980 and 1981, this court changed the implied private causes of actions for private parties that had previously been set by *Cort* and *Cannon*, and permitted causes of actions under ¶ 1983 when Congress creates

federal rights by their passing statutes under the Spending Power to the Constitution. As set forth by the Chief Judge in 1990:

> Rhenquist C.J.: " In *Maine* v *Thiboutot*, the court essentially removed the burden of making the latter three showings by holding that ¶ **1983** generally (with an exception subsequently developed in *Middlesex County Sewarage Authority* v *National Sea Clammers* Assn., 453 U.S. 1 (1981)) **supplies the remedy from vindication of rights arising from federal statutes.**" [emphasis added, see dissenting opinion in *Wilder* v *Virginia Hospital*, 496 U.S. 489, at 525-526 (1990) citing and distinguishing *Cort* v *Ash*, 422 U.S. 66 (1975)].

The case at bar is far stronger than the one that was found to be enforceable by this court in 1990. [see *Wilder* v *Virginia Hospital*, 496 U.S. 498 (1990)]. Unlike Wilder, or Suter, all 3 branches of the state government were addressed and exhausted before the filing of the federal complaint in 1992. Every attempt was made to the State and their officials to investigate the alleged rape by the stepfather. Their conflict of interest led to a concrete uniform policy of inaction. [legislative; executive; and judiciary, App.* 173 "C" ¶'s 133-137] .

The basis for original jurisdiction at bar are mandatory and clear. [42 USC 5106a(b)(2); "A" 94]. The term "shall investigate" is not a suggestion; it is not " amorphous"; it is not a mere "preference", rather it is a " binding obligation". [42 U.S.C. 5106a(b)(2); Cf. *Pennhurst I*, 451 U.S. 1 at 19 (1981); see *Wilder* v *Virginia Hospital*, 496 U.S. 498, at 509- 512 (1990)]. This federal right arises upon the "receipt of a report" given to the grantees. [App.* 177 "C" § 171, 42 USC 5106a(b)(2)]. "Rape" is a specific type of abuse covered by this legislation.[App*. 177 *id.*,"C" ¶ 173 quoting 42 USC 5106 g (7) (B); "A" 94]. The non-enforcement policy is actionable under ¶ 1983. [*Livadas* v *Bradshaw*, 512 U.S. 107, 126-128 (1994)].

As this court is aware of, statutes passed under Article I of the spending power to the Constitution, are construed as contracts, with the States receiving funds on "conditions." [*Pennhurst I*, 451 U.S. 1, at 17 (1981); also see *Suter* v *Artist M*, 503 U.S. 347, at 355, ft. note 8 citing Article I, ¶ 8 , cl. 1]. " The State could relieve itself of federal obligations by declining funds."[*Golden State v City of Los Angeles*, 493 U.S. 103, at 112 (1989)]. In the present case, defendants and the judiciary have been informed, that the child was the victim of "rape" " molestation" " or other forms of sexual exploitation", with it all taking place after December 2nd 1986 through August of 1987. They have been informed of this from December 7th 1987 through July of 1997, to no avail. [42 U.S.C. 5106g (7) (B); "A" 95].

What is of further significance is that in 1992, Congress passed a second amendment to CAPTA and provided additional funds to the grantee states upon certain conditions. The applicable 1992 amendment particularly applies to the case at hand as it is:

> "*designed to improve the handling of child abuse and neglect cases, particularly cases of child sexual abuse* and exploitation, **in a manner which limits additional trauma to the child victim**". [5106c (a) (1) emphasis added; "A" 95].

Section 42 USC 5106c (b)(1), specifically includes the absolute requirement that the grantees "**fulfill the requirements of 5106a(b) of this title.**" [emphasis added]. This was precisely the point at bar as medical evidence warned defendants that to ignore the plight of mistaken identity and time, will increase the harm to the child and magnify the psychiatric and physical injuries that the victim[s] had sustained. [i.e. Dr. Green App* 285 ¶ 33 and App.* 278 ¶ 10 and App. * 274 ¶ 19]

> "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally **presumed** that Congress acts intentionally and purposely in the

disparate inclusion or exclusion."[emphasis added See i.e. *Brown* v *Gardner*, 513 U.S. 115, (1994), Souter J., citing *Russello* v *United States*, 464 U.S. 16, 23 (1983); also see i.e. *Federal Election Commission* v *NRA Political Victory Fund Etc.*, 513 U.S. 88, (1994), Rhenquist C.J.; see *U.S. v Granderson*, 511 U.S. 39, at 63 (1994), Kennedy J.concurring, citing *Gozlon-Peretz* v *United States*, 498 U.S 395, 404 (1991) and *Russello supra*].

This second acknowledgment by Congress in 1992, "presumes" that they intended to create a federal right in 1988.

Furthermore, the "national policy" is to treat the victims of abuse before they become costly to our society and to themselves. This is the legislative intent to the Child Abuse Prevention and Treatment Act of 1988 and 1992, as evidenced by their hearings on the subject. The statistics that Congress relies on demonstrates that victims have a high propensity to commit " **teenage suicide**" and or become **criminals** and ending up in prison. [see Congressional Hearings: Committee on Labor and Human Resources Subcommittee on Children, Family, Drugs, and Alcoholism United States Senate, April 1st 1987 & July 9th 1991, S. Hrg. 102-277; App.* 490-495; & App* 522 and 534 & App*. 330-332 and App*. 185-192].

And, it is crucial to separate the civil and criminal aspects to child abuse. There is no statute of limitations issue as far as the criminal prosecution. [See *Wright* v *Superior Court of Orange County*, 15 Cal. 4th 521; 63 Cal. Rptr. 2d. 322; 936 P. 2d 101 (1997)]. However, there is one in the civil context. [see.,*Tietge* v *Western Province*, 64 Cal. Rptr. 2d 53; 55 Cal. App. 4th 382 (1997)].

Of import are the most recent rulings by this courts in Suter and Blessing. [*Suter* v *Artist M*, 503 U.S. 347 (1992); *Blessing* v *Freestone*, 117 S. Ct. 1353 (1997)]. In Suter, the term "reasonable efforts" of 42 U.S.C. ¶ 671 (a) (15) of the Adoption Act was not found to be an enforceable right by a private party as " the regulations are not specific

and do not provide notice to the States that failure to do anything other than to submit a plan".[*id.* at 361-362]. This court concluded that "reasonable efforts" was not sufficient, and that it is "only a generalized duty on the State, to be enforced not by private individuals, but by the Secretary." [*id* . at 363].

However, "shall investigate" "rape" is <u>not</u> merely a "generalized duty". In the present case, the defendants did receive actual notice of this event. Such a right is enforceable by a private third-party beneficiary, once proper notice is given to the grantees. A private right is not for the Secretary to enforce. This court acknowledged this precise point when it rendered its important decision in Blessing:

> " Even assuming the Secretary's authority to sue for specific performance, Title IV- D's administrative enforcement arsenal would not compare to those in *Sea Clammers* and *Smith*, especially if, as the Government further contended, see *id*, at 49-50, <u>*no private actor would have standing to force the Secretary to bring suit for specific performance*</u>. <u>*To the extent that Title IV-D may give rise to individual rights*</u>, therefore, we agree with the Court of Appeals that the Secretary's oversight powers are not comprehensive enough to close the door on ¶ 1983 liability." [emphasis added, *Blessing* v *Freestone*, 117 S. Ct. 1353, at 1363, citing 68 F. 3d, at 1151-1156].

The argument in the present case fully satisfies the test set forth in *Blessing*. [*Blessing* v *Freestone*, 117 S. Ct. 1353 (1997)]. The complaint did not attempt to have the defendants "substantially comply" with CAPTA. [cf. *Blessing supra* at 1361]. The attempt was to have the defendants at bar "investigate" whether the child was raped by her stepfather. This is not a "broad brush" and or "blanket approach" in alleging a private cause of action under ¶ 1983. [cf. and see *Blessing supra* 117 S. Ct. at 1361]. The child's testimony at the in camera hearing cried out that she was the victim of "rape". The complaint specifically set forth that plaintiffs were third-party beneficiaries to the

contract between the Federal and State governments. As the complaint of July 8th 1992 sets forth:

> "It is alleged that **plaintiffs are intended beneficiaries** of the federal grant as they are both victims of abuse, all of which occurred under the power of the State after plaintiffs were restrained of their liberty..... " " Plaintiffs are **intended beneficiaries of federal statute**." [emphasis added "C" ¶'s 160 & 175 App.* 176-177].

This is fully consistent with the concurring opinion set forth in Blessing:

> " It ***must*** **be acknowledged that *Wright* and *Wilder* permitted *beneficiaries* of federal state contracts to sue under ¶ 1983."**
> [emphasis added *Blessing* v *Freestone*, 117 S. Ct. 1353 *at* 1364, Scalia, Kennedy, J.J. concurring].

The case at bar has set forth "well defined claims". [see *Blessing* v *Freestone*, 117 S. Ct. 1353, at 1360-61 (1997) citations omitted]. The law as declared by the Supreme Court stands on all 4 grounds. It is "Congress, not the States", that are the authors of "*national policy*". [*Helvering* v *Davis*, 301 U.S. 619, at 645 (1937) Cardozo, J., quoted in *Rosado* v *Wyman*, 397 U.S. 397, 420-423 (1970)]. Here lies the "genesis" for original subject matter jurisdiction when examining the core of the complaint under a " kaleidoscope". [*Gully* v *First Nat. Bank in Meridian* (Cardozo, J), 299 U.S. 109, at 114-118 (1936)]. The ruling by the Court from Ankenbrandt in 1992 to Blessing in 1997, when read in conjunction with M'Cullough; Maine; Wilder; Wright; Sea Clammers; and Suter; leaves no doubt that the federal court was the proper avenue for proper enforcement.

> " When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is the duty to take such jurisdiction. " " The right of a party to choose a Federal court where there is a choice cannot properly be denied." [*England* v *Board of*

Medical Examiners, 375 U.S. 411, 415 (1964) citing *Willcox* v *Consolidated Gas. Co.*, 212 U.S. 19, 40 (1909) also see *Bank One Chicago* v *Midwest Bank*, 116 S. Ct. 637, at 643 (1996) Ginsberg J.].

Indeed, there is a "strict duty" to determine a case in this field of law that presents federal statutes for the court to interpret. [*Quackenbush* v *Allstate Ins.*, 116 S. Ct. 1712, at 1720 (1996), O'Conner J.]

Lastly, this court in Suter did not in any fashion change the former rulings and tests of Wilder; Maine; Wright; Pennhurst I; or Sea Clammers. [*Suter* v *Artist M.*, 503 U.S. 347, at 355-56 (1992)]. As this court set forth in 1992:

> " *contrary* to respondents assertion that finding 42 U.S. C. ¶ 671 (a) to require only the filing of a plan for approval by the Secretary *would add a new "'prerequisite* for the existence of a right under ¶ 1983,"' brief for Respondent 22 n. 6, *our holding today imposes no new 'pre-requisites' but merely counsels that each statute must be interpreted by its own terms.*" [emphasis added *Suter* v *Artist M,* 503 U.S. 347 at 358 n. 8 (1992)].

Further, this court stated in pertinent part as follows: " For example, 42 USC 672(e) provides.... buttresses a conclusion that Congress had a different intent with respect to it." [*Suter id.*, at 361 n. 12]. Any suggestion by the courts that Wilder should be ignored as a result of Suter, are in error. [see i.e.*Chan* v *City of New York,* 803 F. Supp. 710 (1992) aff'd 1 F. 3rd 96, at 104 (CA2) (1993) *cert. denied* 114 S. Ct. 472 (1993); *Kelly* v *Leshawn A.* 762 F. Supp. 959 (1991) affirmed on different grounds 990 F. 2d 1319 at 1325-26, (1993) cert. denied, 114 S. Ct. 691 (1994)]. Therefore, the existing law of 1992 was not changed in any fashion or form by the ruling of this court in Blessing. There was at all times original jurisdiction based upon the existing law as permitted under FRCP 11.

II. B. *There are no internal remedies provided by Congress that are being "bypassed". Section 1983 is the proper remedial course.*

All case precedent from this court make clear that in no fashion can there be any preclusion of ¶ 1983 in the present case. [*Middlesex County* v *Sea Clammers,* 453 U.S. 1, at 19- 21 Powell J. (1981); *Blessing* v *Freestone*, supra, at 1362-1363 (1997)]. Finally, internal remedies created by Congress effects all possible complaints from being filed in federal court, not just ¶ 1983. [see i.e *Meghirg* v *KFC Western Inc.*, 116 S. Ct. 1251, at 1256 (1996) O'Conner J.citing *Middlesex supra,* 453 U.S. 1, 14 (1981);

II. C. *The doctrine of prospective pre-emption applies. This supports original jurisdiction from the outset. Younger and Burford abstention principles are not germane.*

" Once an area of state law has been completely pre-empted, state law is considered, from its inception, a federal claim and therefore arises under federal law." [*Caterpillar Inc.* v *Williams*, 482 U.S. 386, at 393 (1987); also see *Livadas* v *Bradshaw*, 512 U.S.107, 116-119; (1994) Souter J.; *Hines* v *Davidowitz,* 312 U.S. 52, 67 (1941)]. This doctrine applies in the case at hand. [12]

III. APPLICABLE STANDARD OF REVIEW

When both statutes and constitutional issues are at issue, it is proper to first address the federal statute. The

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12 In the underlying decision by the district court that dismissed the complaint, the lower court relied on Pennhurst II a decision that discussed the attempt by the plaintiff to attack state statutes. [*County of Westchester, supra* 828 F. Supp. 238 at 243]. This is legal error. Burford does not apply to federal statutes, nor to pre-emption. [*Quackenbush v Allstate Ins.* 116 S. Ct. 1712, at 1726 (1996) quoting *NOPSI*, 491 U.S. 350, 361 & 363 (1989)].

federal statutes at bar were never analyzed or considered which is legal error. [*Youakim* v *Miller,* 425 U.S. 231, at 236 (1976); *In re Snyder*, 472 U.S. 634, 642 (1984); *Burton* v *United States,* 196 U.S. 283, 295 (1905); *Jean* v *Nelson*, 472 U.S. 846, 854 (1985) quoting *Three Affiliated Tribes etc.*, v *Wold Engineering*, 467 U.S. 138 (1984)], *Spector Motor Service* v *McLaughlin*, 323 U.S., 101, 105 (1944)]. Thus, " *prior* to reaching any Constitutional questions, federal courts must consider nonconstitutional grounds for decision." [*Jean* v *Nelson, supra,* at 854 emphasis supplied, quoting *Gulf Oil Co.,* v *Bernard*, 452 U.S. 89, 99 (1981)].

IV. SANCTIONS ARE IMPROPER. THE CASE IS WORTHY TO BE RESTORED ON BEHALF OF THE CHILD.

This court found that differences of opinions is not sufficient for a frivolous finding. [see i.e. *Anders* v *Cal.* 386 U.S. 738 (1967) cited in *Neitzke* v *Williams*, 490 U.S. 321, at 325 (1989)]. This has taken place with another district court finding this exact statute to be enforceable under ¶ 1983. [*Jeanine B.*, 877 F. Supp. 1268 at 1285-1286, (E.D. Wis.) (1995) 42 USC 5106a(b)(2)]. Moreover, another Circuit Court judge, would too have found an enforceable right under 42 USC 5106a(b)(2). [see *Doe* v *District of Columbia*, 93 F. 2d. 861, at 879 Rogers, C.J. (CADC) (1996)]. The Court of Appeals is in error. [see "A" 3]. "Frivolous findings are those that are both (1) baseless and (2) made without a reasonable and competent inquiry." [*Montrose Chemical* v *Latham & Watkins*, 117 F. 3d.1128, 1133 (CA9) (1997) citing *Buster* v *Greisen*, 104 F.3d 1186, at 1190 (CA9) (1997)]. Neither applies when the conduct was proper. As this court stated:

> " ' To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort" ' ... "We have never held that a sentencing court could punish lawful conduct. The distinction is precisely the one we saw here."[*BMW v Gore,* 116 S. Ct. 1589 at 1597-98 (1996) ft. note 19 citing and quoting *Bordenkircher* v

Hayes, 434 U.S. 357, 363 (1978)].

Furthermore, this court stated:

> Sanctions are "imposed" and " justified" " to "deter future misconduct". [*BMW id.*]. " Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition" [*BMW supra. at 1595,* citing *Gertz* v *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Newport* v *Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981); *Pacific Mut. Life Ins. Co.*, v *Haslip*, 499 U.S. 1, at 22 (1991)].

This will not occur as this court just made clear that private parties have standing in the field of domestic relations to name state officials under ¶ 1983. [*Blessing supra*]. Moreover, there is a conflict between the circuit courts respecting whether or not the appointment of a guardian ad litem is a constitutional " predicate" before deciding the case. [see *Chrissie F.* v *Miss. Dep't of Public Welfare*, 995 F. 2d 595, 599-600 (CA5) (1993), cert. denied, 510 U.S. 1214, (1994); *Chrissie F. I*, 883 F. 2d 25 (CA5) (1989)]. And, in the present case, there is a different "law of the case" provided for the Appellate Division Second Dep't compared to the Circuit Court. Lastly, the Court of Appeal and the district court ignore Congress and the rulings of this Court which are binding upon them.

The harm to the child is obvious and for petitioner to be sanctioned is professionally damaging. " Reputation... is a plant of tender growth, and its bloom, once lost, is not easily restored." [*People ex. rel. Karlin* v *Culkin*, 248 NY 465, 478 (1928) Cardozo C.J.]. These are all respectfully viable points supporting the granting of the petition. [Supreme Court Practice; Seventh Ed. by Stern, Gressman, Shapiro, & Geller; Chapter 4 p. 194 ft. note 58 citing S. Baker, A Practical Guide to Certiorari, 33 Cath. U.L. Rev. 611, 619 (1984)].

Furthermore, it is hornbook case law that the child is brought to the courts attention through the parent. [See

Everett v *Everett*, 57 Cal. App. 3d 65, at 70 ft. note 8 (1976)]. Mr. Levine lacks the power or authority to remove or surrender the separate and "independent" rights of the child. [See i.e *Camacho* v *Camacho*, 173 Cal. App. 3d 214, at 220, (1985)]. Her rights have never been legally "closed".[see and cf. *Reynoldsville Casket Co.*,v *Hyde*, 514 U.S. 749, at 758 (1995)].

It is respectfully requested that this matter be restored on behalf of the minor child. ["straightforward duty on the court" see i.e. *Simmons* v *South Carolina*, 512 U.S. 154, at 173 concurring Souter, J. (1994) ; also please see *Finlay* v *Finlay*, 240 NY 429, 434-435 (1925) "parens patriae"]. "Equit[ies]" primary " concern is for the child". [*Finlay*, Ch. J. Cardozo, *supra* at 434]. As Congress has not provided with any internal remedy for the Child Abuse Prevention and Treatment Act, the court does have equitable power. " The comprehensiveness of the equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislation command." [*Porter* v *Warner Holding Co.*, 328 U.S. 395, 398 (1946); also see *Brown* v *Swann*, 10 Pet. 497, 503. 9 L. Ed. 508, 35 U.S. 497 (1836); also see *United States* v *Moore*, 340 U.S. 616, at 618-619 (1951)].

CONCLUSION

Petitioner has cautiously followed the conservative principles of this court. It is respectfully requested that the petition be granted and a writ of certiorari be issued.

Dated: New York N.Y.

Respectfully submitted,

Richard Zelma*
Attorney for petitioner[s]
221 West 82nd Street
New York NY 10024
(212) 595-1928
*Counsel of Record

September 11th 1997

No.

In The

Supreme Court of The United States

October Term, 1997

RICHARD ZELMA individually and on behalf of SHAWNE L. for the appointment of a guardian ad litem,

Petitioners,

ANDREW LEVINE, *Plaintiff,*

- against -

DONNA McLEOD, INDIVIDUALLY OR AS A STATE ACTOR AND THE COUNTY OF WESTCHESTER et. al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (5331)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

filed July 24, 1997

96-7747
Docket number

LEVINE

v.

NOTICE OF MOTION

COUNTY OF WESTCHESTER

for Restoring briefs to record for preserving arguments and to reconsider dismissal of appeal

---

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

Fred L. Parker, U.S.C.J.

7/31/97
Date

A 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

filed June, 9 1997

96-7747
Docket number

LEVINE

v.

NOTICE OF MOTION

COUNTY OF WESTCHESTER

for rehearing (40a) restore brief and the appeal and restore on calendar

---

IT IS. HEREBY ORDERED that the motion be and it hereby is denied. Appellant is correct that he had permission to file an oversize brief. However an improper font size was used which improperly added much material. The other grounds for dismissal were also correct.

James L. Oakes, U.S.C.J.

Frank K. Altimari, U.S.C.J.

Fred I. Parker, U.S.C.J.

6/ 18 / 97
Date

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of June , one thousand nine hundred and ninety-seven.

Andrew Levine, et al.,
Plaintiff-Appellant,

Richard Zelma,
Appellant,

No. 96-7747

v.

COUNTY OF WESTCHESTER, ET AL.
Defendants-Appellees

Appellant Richard Zelma appeals the imposition of Rule 11 sanctions by John E. Sprizzo, Judge, of the Southern District of New York. The sanctions followed the 1994 remand of a case which was dismissed and affirmed by summary order on appeal. The brief on appeal fails to address in any meaningful way the only appealable points, being the imposition of and the amount of sanctions posed.

In addition, appellant's brief exceeds Fed. R. App. P. 28's 50 page limit requirement without any permission to do so. It is single spaced, which is in violation of the Court's Rule and

would further substantially lengthen the brief if it were in compliance with the Rule.

This panel hereby sua sponte strikes the non-compliant brief and dismisses the appeal as being so indisputably lacking in merit as to be frivolous within the meaning of 28 U.S.C. § 1915(e). See Neitzke v. Williams, 490 U.S. 319 (1989).

In addition, appellant has petitioned for rehearing the prior appellate panel's decision, some two years after the time for filing such a petition has expired. The petition for rehearing is dismissed.

Attorney Zelma has barraged the Court with several hundred pages of filings of frivolous motions previously denied in connection with this appeal. This is a reminder that the continued filing of non-compliant prolix, and frivolous documents can result in the imposition of additional sanctions.

JAMES L. OAKES, U.S.C.J.

FRANK K. ALTIMARI, U.S.C.J.

FRED I. PARKER, U.S.C.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

filed April 29, 1997

96-7747
Docket number

LEVINE

v.

COUNTY OF WESTCHESTER

NOTICE OF MOTION

for Transfer to original panel; stay of oral argument; and/or petition for rehearing. [F.R.A.P. 34 b; 27 a & 40a.]

Brief statement of the relief requested: By virtue of Blessing v. Freestone, rendered by United States Supreme Court on April 21st, 1997, sanctions is legally improper and complaint was all times properly brought under section 1983 on behalf of plaintiffs, on July 8th 1992.

IT IS HEREBY ORDERED that the motion be and it hereby is denied insofar as it seeks to transfer to the original panel, and denied insofar as it seeks stay of oral argument and referred to the panel hearing this appeal insofar as it seeks a rehearing.

Fred L. Parker, U.S.C.J.

5/2/97
Date

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

96-7747
Docket number

LEVINE

v.

NOTICE OF MOTION
for leave to file brief in excess of 50 pages

COUNTY OF WESTCHESTER

Brief statement of the relief requested:
To file appellate brief in excess of fifty (50) pages

O R D E R
IT IS HEREBY ORDERED that the motion be and it hereby is ordered only to the extent that an oversized brief not to exceed 58 pages may be filed.

12/13/96

Scardelli

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

LEVINE

-against- Docket # 96-7747

COUNTY OF WESTCHESTER

---

40 Centre Street
New York, New York

October 8, 1996
a.m,

Oral Arguments Before: OAKES,
ALTIMARI and MAHONEY, CJJ.
Verbatim transcript from tape
of U.S. Court of Appeals, Second Circut

Cardinal Reporting Company

321 Broadway
New York, NY 10007

(212) 227-9490

JUDGE MAHONEY: Oh, that's right, Levine...

MR. ZELMA: I trust that you received and you have read all of my points and relied on those points.

JUDGE ALTIMARI: May we have your name and the case number...

MR. ZELMA: My name is Richard Zelma, your honor, and it's Levine v. County of Westchester.

JUDGE ALTIMARI: Okay. Thank you.

MR. ZELMA: In short, I do not want to waste this court's time. I just would like to say that I did find a very important document which would establish and increase the likelihood of success on the underlying appeal significantly. The lower court judge in his Order of January 31st, 1996, states as follows: "At oral argument on the instant motion, however, counsel for McLeod represented that the appellate application was made against Zelma, rather than Levine. Thus, by granting that application for sanctions, the Second Circuit sub silentio granted the sanction against Zelma."

This remarkable statement is literally incorrect and specifically refuted by Ms. Duker herself in her supplemental affirmation dated May 18th, 1995, when she states in paragraphs three and four as follows:

- Ms. Duker wrote as follows:

Paragraph 3, which I have here, and which I want to submit to you -- either today or on a supplemental declaration.

"At the oral argument of this motion held on May 5, 1995, affirmant represented that she did not brief the issue of sanctions on appeal. However after reviewing the file it appears that I was mistaken in this regard, and that I did brief the issue of Rule 38 sanctions. Affirmant apologies to the Court for this unintentional misstatement."

Paragraph 4. "The papers which I submitted to the Court of Appeals, Second Circuit, indicate that I requested an award of Rule 38 sanctions against both appellant Andrew Levine and/or Richard Zelma. ...This request therefore is for an award on a joint and several basis."

The lower court judge refused to grant me any hearing whatsoever. I made correct and timely motions to him for a new appointment of a guardian ad litem and, he did not — he never discussed that either. He just limited the entire hearing to sanctions against me when my client did not allow me, because he-- terminated my relationship with him on July 15th, 1994, and he did not allow me to pursue the case to the Supreme Court of the United States.

And the Supreme Court of the United States, as you know, is now reviewing and denied the motion by the respondents in Freestone, and they are entertaining Blessing v. Freestone case, and that case is going to review, Maine, Wilder, Suter, Seminole, and the 11th Amendment, and the spending power compared to the Commerce Clause, and they are going to discuss and rule on that case, which has

very significant relevance to the case at bar. No matter what the Supreme Court will do...

JUDGE OAKES: Usually we let the panel that's hearing the appeal decide whether to hold such a thing in abeyance. We don't decide the case on the motion to stay pending the Supreme Court decision.

MR. ZELMA: It will cost me at least five thousand dollars which is why I bring up this incredible misstatement by the lower court judge on the face of the decision. It will cost me five to ten thousand dollars — and that's a lot of money to me...

JUDGE MAHONEY: To do what? To do what?

MR. ZELMA: To appeal the case. I have to file this at an enormous expense -I paid for the first appeal. And I...

JUDGE MAHONEY: And, what will you do if -- what will you do if the Supreme Court opinion comes down favorably? You would still have to appeal..

MR ZELMA: I would be glad. That's a very good question... I would have to go back to you. You are Judge Mahoney. I know that Judge Mahoney was on that panel.

JUDGE MAHONEY: Yes.

MR. ZELMA: I would make an application to that panel for a re-hearing -- a late re-hearing based on the new law and/or to have you vacate the writ of mandate based on the new law. The Christianson case -- that supports your

panel to do so.

Judge Newman gave -- granted the Order on June 20th, but he did this by himself. He did not entertain a motion for a stay. So I am being definitely harmed by this in a significant manner, and I would respectfully submit to you and inform you that I believe I was right.

To begin: The Federal statutes passed by Congress created a Federal right to enforce under Section 1983. Even if the Supreme Court accepts the petitioner's argument and reverses Maine — let's assume they reverse Maine -- that's what they're asking for -- and they say Seminole dictates and we don't want to ever hear another Section 1983 case based on Congress passing statutes -- that still would not harm me. I would still be correct in bringing this case in 1992. That was the existing law in 1992.

But it appears that in all likelihood, I say this cautiously, that they are going to reverse themselves or modify Suter. That's why they accepted jurisdiction in this case. They did not accept jurisdiction in Davis, which determined the exact same statute, and was rendered by the Tennessee Supreme Court, and the difference between the two cases is that the Tennessee Supreme Court followed Wilder and Maine and ignored Suter. And in this case, the 9th Circuit, majority opinion, relied and distinguished Suter. And it is Suter that is criticized by Congress in October of 1994, after your panel affirmed the District Court's dismissal of this case.

So, my point is my client/my adversary is not here. I hope that you will grant my motion and/or that you will

allow her to answer the moving papers and I asked for this specific date for oral argument because at the time when I asked for it, the respondent's brief in Freestone was due on September 27th and because I wanted you to see the respondent's brief in Freestone. So that was changed because they made a motion and that brief now is due October 17th. So what I was asking -- what I was thinking of is -- of having you review that brief and defer this oral argument, and you will allow my adversary to answer my papers so we can have that on a later date in October.

JUDGE MAHONEY: We're going to deny the motion for a stay pending a determination by the Supreme Court.

MR. ZELMA: Thank you very much.

(End of verbatim transcript of Court of Appeals tape by DOLORES M. O'BRIEN.)

SDNY
92-CV-1702
SPRIZZO

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of June , one thousand nine hundred and ninety-six.

ANDREW LEVINE,
Plaintiff-Appellant,

v. 93-7803, 96-8013

COUNTY OF WESTCHESTER, ET AL.
Defendants-Appellees

ORDER

Upon consideration of the motion of Richard Zelma, filed April 2, 1996, for leave to file (a) an appeal from an order of the District Court dated January 31, 1996, and entered February 5, 1996, (b) an appeal from an order of the District Court dated February 20, 1996, and entered February 23, 1996, (c) a petition for rehearing of this Court's

order dated March 2, 1994, and (d) a request "to direct the District Court to appoint a guardian ad litem on the child's behalf, and or properly decide the motions/cross motion of December 29th 1994,"

It is hereby ORDERED that leave to file an appeal from the District Court's order dated January 31, 1996, and entered February 5, 1995 (the order imposing sanctions on Zelma in an aggregate amount of $10,500) is granted; it is further ORDERED that leave to file an appeal from the District Court's order dated February 20, 1996, and entered February 23, 1996, is granted only to the extent of permitting an appeal from the portion of the order dated February 20, 1996, and entered February 23, 1996, that denied Zelma'a motion to vacate the sanctions order and is denied in all other respects; it is further ORDERED that leave to file a petition for rehearing of this Court's order dated March 2, 1994, is denied, and it is further ORDERED that leave to file a request for the relief set forth in item (d) above is denied.

With respect to the limited matters as to which leave to appeal has been granted, the Clerk shall issue a scheduling order.

Hon. Chief Judge Jon O. Newman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LEVINE, ET AL.

Plaintiffs,

- against -

92 CIV 1702 JES

ORDER

COUNTY OF WESTHCHESTER, ET AL.

Defendants

----------x

The above-captioned action having come before this Court, and Richard Zelma, former counsel for plaintiffs, having filed a motion to vacate the Court's Memorandum Opinion and Order dated January 31, 1996, a motion requesting reconsideration of his earlier motion to withdraw filed December 31, 1994, and a motion requesting a new hearing for the appointment of a guardian ad litem on behalf of the child Shawne L. and a stay of the Court's orders pursuant to Rules 59(a) & 62(b), and the Court having considered all matters raised, it is

ORDERED that Richard Zelma's motions shall be and hereby are denied in all respects.

Dated: New York, New York
February 26, 1996

_____

John B. Sprizzo
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANDREW LEVINE and SHAWNE L.LEVINE
Plaintiffs,

- against -

92 CIV 1702 JES

COUNTY OF WESTHCHESTER, OFFICE OF THE DEPARTMENT OF SOCIAL SERVICES OF WESTCHESTER COUNTY, OFFICE OF CHILD PROTECTIVE SERVICES OF OSSINING, NY, OFFICES OF THE COUNTY ATTORNEYS OF WESTCHESTER, NY, ATTORNEY GENERAL OF THE STATE OF NEW YORK, OFFICE OF JEWISH COMMUNITY SERVICES, MARIA JOY FRANK, DONNA McCLEOD, STATE OF NEW YORK, STATE OF NORTH CAROLINA, HON. ORAZIO BELLANTONI, HON. VINCENT COLABELLA AND HON. CHESTER DAVIS,
Defendants

MEMORANDUM OPINION AND ORDER

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SPRIZZO, D.J.

Plaintiff Andrew Levine brings the instant action on behalf of himself and his daughter against the State of New York, the State of North Carolina, the County of Westchester, various county agencies, various state court judges and his former wife, Donna McLeod (collectively "defendants"). By Memorandum Opinion and Order dated July 30, 1993, the Court granted defendants' motions to dismiss. Pursuant to Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"), defendant McLeod now moves for sanctions against Levine and his former counsel of record, Richard Zelma.

BACKGROUND

The facts underlying the instant action, which will be briefly summarized, are set forth in the earlier opinion by the Court. See Levine v. County of Westchester, 828 F. Supp. 238 (S.D.N.Y. 1993).

Andrew Levine and Donna McLeod were married in 1980. See Levine, 828 F. Supp. at 240. On or about November 3, 1986, McLeod filed for divorce in the Supreme Court of the State of New York,Westchester County. Id. On December 1, 1986, McLeod filed a family offense petition in the Family Court of the State of New York alleging, inter alia, that Levine had sexually abused their five year old child. Id. On February 24, 1988, the state court concluded that Levine had sexually abused the child, granted custody to McLeod and issued a permanent order of protection on behalf of the child. Id.

On March 9, 1992, Levine commenced the instant civil rights action against defendants, seeking declaratory and

injunctive relief in a complaint comprised of 121 pages, 204 paragraphs and 25 exhibits. On March 13, 1992, Levine filed an "Amended Complaint" comprised of 116 pages, 203 paragraphs and 25 exhibits. On May 18, 1992, Levine filed another "Amended Complaint" comprised of 101 pages and 260 paragraphs, but no exhibits. On June 3, 1992, Levine filed a "Second Amended Complaint" comprised of 101 pages, 310 paragraphs and 34 exhibits. On July 8, 1992, Levine filed a "Third Amended Complaint" comprised of 50 pages, 204 paragraphs and 43 exhibits.

Between August 7, 1992 and August 25, 1992, defendants moved to dismiss the Third Amended Complaint on the grounds of, inter alia, lack of subject matter jurisdiction, lack of personal jurisdiction and failure to state a claim upon which relief may be granted.[1] By Memorandum opinion and Order dated July 30, 1993, the Court dismissed the instant action as to all defendants.

On August 5, 1993, Levine filed a notice of appeal. On November 22, 1993, defendant McLeod moved for Rule 11 sanctions against then counsel of record for Levine, Richard Zelma. By Order dated April 19, 1994, the Court denied the motion for sanctions in light of the pending

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[1] At that time, certain defendants raised the issue of sanctions under Rule 11. However, the Court deferred consideration of the requests for sanctions until the filing of formal motions. See Levine, 828 F. Supp. at 241, n.2.

appeal. On March 2, 1994, the Second Circuit affirmed the district court's dismissal of Levine's claims and awarded reasonable appellate attorneys' fees to McLeod, in an amount to be determined by the district court not to exceed $6,000.00. See Levine v. County of Westchester, No. 93-7803 (2d Cir. Mar. 2, 1994).

On August 9, 1994, Zelma moved to withdraw as counsel for Levine, nunc pro tunc as of July 15, 1994.[2] By Order dated November 29, 1994, the Court granted the motion to withdraw as counsel, effective that day.

On December 16, 1994, defendant McLeod filed the instant motion for Rule 11 sanctions against both Levine and Zelma, now his former counsel of record. On May 5, 1995, the Court heard oral argument on the motion. Since that time, Zelma has filed no less than sixteen affirmations and legal memoranda with the Clerk of Court. In these affirmations and memoranda, Zelma argues, for the most part, that the Court erroneously decided the underlying action and that the Second Circuit erroneously affirmed that decision.

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[2] At that time, Zelma also moved. for both a permanent injunction and an award of sanctions against Levine. In the same Order, however, the Court denied those motions.

DISCUSSION

Rule 11, which is designed to deter baseless filings and curb abusive litigation, see Business Guides, Inc. v. Chromatic Comm. Enters., Inc., 498 U.S. 533, 553 (1991), imposes an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of claims. See Eastway Constr. Corp. v. New York, 762 F.2d 243, 253 (2d Cir. 1985).

In December 1993, Rule 11 was amended in several respects. See generally Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1326-29 (2d Cir. 1995) (discussing amended Rule 11). The amended rule creates a 21-day "safe harbor" period for the withdrawal of frivolous factual or legal contentions. Fed. R. Civ. P. 11 (c)(l)(A). The amended rule also requires that arguments "for the extension, modification, or reversal of existing law" be "nonfrivolous," rather than made in "good faith." Fed. R. Civ. P. 11 (b) (2). In addition, the amended rule now provides that "monetary sanctions may not be awarded against a represented party" for frivolous legal arguments. Fed. R. Civ. P. 11 (c)(2)(A). Finally, under the amended rule, the district court is now afforded discretion in determining whether to impose sanctions upon a finding of sanctionable conduct. Fed. R. Civ. P. 11 (c).

The application of amended Rule 11, which became effective December 1, 1993, was considered by the Second Circuit in Knipe v. Skinner, 19 F.3d 72, 77 78 (2d Cir.

1994).[3] In Knipe, the Second Circuit remanded for the district court to exercise its discretion in determining whether to impose sanctions under the amended Rule 11. See Knipe, 19 F.3d at 78. However, the court added that "[a]ny further retroactive application of the amended Rule 11 would charge . . . knowledge of a rule not in effect at the time of filing and therefore would not advance Rule ll's central goal of deterring baseless filings." Id. (citinq Cooter & Gell, 496 U.S. at 393). Thus, while the Court may impose sanctions in its discretion, in exercising that discretion the Court must apply the pre-amended Rule 11 to this sanctionable conduct, which occurred primarily prior to December 1, 1993. See Knipe, 19 F.3d at 78; see also MacDraw, Inc. v. CIT Group Equip. Fin., Inc., No. 95-7021, slip op. 815, 823 (2d Cir. Jan. 3, 1996) (pre-amended rule applies to allegedly sanctionable conduct that occurred prior to effective date of 1993 amendments); Sussman v. Bank of Israel, 56 F.3d 450, 456 (2d Cir. 1995) (pre-amended rule applies to action filed in 1991 and decided in l994).

The instant action is unquestionably frivolous, particularly as to defendant McLeod. Not only does it fail to set forth any colorable basis for personal jurisdiction against McLeod, but it also appears to challenge the correctness of

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[3] The amended Rule 11 governs "all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 146 F.R.D 404 (Apr. 22, 1993) (Supreme Court order amending the Federal Rules uf Civil Procedure).

numerous state court decisions, which a federal district court clearly lacks subject matter jurisdiction to review. See Rooker v. Fidelity Trust Company, 263 U.S. 413, 416 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-84 (1983). Moreover, there is no allegation that Levine was deprived of any constitutional right by McLeod, who is not even arguably a state actor. See Levine, 828 F.Supp. at 244-45. Indeed, in awarding reasonable appellate attorneys' fees on appeal, the Second Circuit observed that "[t]he appeal is frivolous with respect to all defendants, but particularly as to Donna McLeod." Levine v. County of Westchester, No. 93-7803 (2d Cir. Mar. 2, 1994). Therefore, based upon the entire record herein, the Court concludes that a monetary sanction to cover defendants' costs and attorneys' fees is appropriate.

The Court must now determine the appropriate amount of sanctions in connection with both the district court and appellate proceedings. In her first motion for sanctions, McLeod sought $10,805.20 in connection with defending the underlying action, $2,887.50 in connection with the first motion itself and any future fees incurred in relation thereto. Affirmation of Naomi Duker in Support of Motion for Sanctions, Dated Nov. 10, 1993, ¶¶ 10-11, 14, Exhs. B, C, Attached to Duker Notice of Motion, Dated Dec. 16, 1994, Exh. A. ("First Duker Aff."). The first motion requested a total of $15,000.00 in sanctions. Id. ¶ 14.

In the instant motion for sanctions, McLeod seeks an unspecified amount in connection with defending the underlying action, $3,862.15 in connection with the first motion for sanctions, an unspecified amount in connection with the instant motion itself and any future fees incurred in

relation thereto. Affirmation of Naomi Duker in Further Support of Motion for Sanctions, Dated Dec. 14, 1994, ¶¶ 6, 10-11, Exhs. A, D, E ("Second Duker Aff."). The instant motion initially requested a total of $17,900.00 in sanctions. Id. ¶ 11. However, in a supplemental affirmation, McLeod now seeks a total of $19,527.94 in sanctions. Supplemental Affirmation of Naomi Duker, Dated April 28, 1995 ¶ 7.

In determining the amount of the sanctions, however, the Court must be mindful of the fact that a concededly frivolous claim should not reasonably require an enormous expenditure of time and effort to refute. The Court must also take into consideration that the two motions for sanctions and indeed the legal arguments made in opposing Levine's claims are largely based upon the same or nearly identical legal arguments and thus necessarily involves some duplication of effort which must necessarily give rise to a reduction in the amount of sanctions claimed. The Court is aware, however, that counsel for plaintiff has manifested a tendency to file overly lengthy complaints and send endless correspondence which have increased the cost of this litigation.

In sum, applying all of these factors to this case, the Court, in its discretion, concludes that McLeod should be awarded a total of $7,500.00 in sanctions for the district court proceedings and $3,000.00 in sanctions in connection

with the appeal in this case.[4] See Eastway Constr. Corp. v. City of New York, 821 F.2d 121, 123 (2d Cir. 1987) (noting that amount of Rule 11 sanctions need not equal traditional lodestar amount).

Not surprisingly, Levine and Zelma strongly contest the proper allocation of the imposed sanctions between attorney and client. The allocation of attorneys' fees between a party and counsel lies within the sound discretion of the district court. See Eastway, 821 F.2d at 124. In this case, Zelma continues to maintain his frivolous legal position concerning the issues of personal and subject matter jurisdiction, First Duker Aff. ¶ 7, despite repeated

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[4] McLeod claims that $5,561.50 in attorneys' fees and expenses were incurred on appeal. Second Duker Aff. ¶¶, 7, Exh. G.

admonitions by the Court. [5] See Paganucci v. City of New York, 993 F.2d 310, 312-13 (2d Cir. 1993). Where, as here, the underlying facts are largely undisputed, counsel is primarily responsible for ascertaining whether claims are supported by existing law or a nonfrivolous argument for the extension thereof. See Kirk Capital Corp. v. Bailey, 16 F.3d 1485, 1488, 1492 (8th Cir. 1994). Indeed, that concept is reflected in the amended Rule 11. Thus, in its discretion, the Court imposes the sanctions upon Zelma.[6]

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[5] On or about August 30, 1995, Zelma filed another affirmation and memorandum to the Second Circuit which again sought to restore the instant action on behalf of the child.

[6] In its mandate, the Second Circuit did not indicate against whom the appellate sanction should be imposed. See Levine v. County of Westchester, No. 93-7803 (2d Cir. Mar. 2, 1994). At oral argument on the instant motion, however, counsel for McLeod represented that the appellate application was made against Zelma, rather than Levine. Thus, by granting that application for sanctions, the Second Circuit sub silentio granted the sanction against Zelma.

CONCLUSION

For the reasons set forth above, defendant McLeod's motion for sanctions shall be and hereby is granted. The Court awards sanctions in the amount of $7,500,00 against Richard Zelma in connection with the district court proceedings. As per the Second Circuit mandate, the Court awards sanctions in the amount of S3,000.00 against Richard Zelma in connection with the appellate proceedings.

It is SO ORDERED,
Dated: New York, New York
January 31st , 1996

John B. Sprizzo
United States District Judge

APPEARANCES

ANDREW LEVINE, Plaintiff, Pro Se
2741 East 28th Street, Brooklyn, New York 11235

RICHARD ZELMA, ESQ., Former Attorney for Plaintiff
221 West 82nd Street, New York, New York 10024

GOLD & DUKER,
Attorneys for Defendant Donna McLeod
470 Mamaroneck Avenue, Suite 210,
White Plains, New York 10605

NAOMI R. DUKER, ESQ., Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Levine	)	93-7803 *Docket #*
	)	
v	)	**NOTICE OF**
County of Westchester	)	**MOTION**
	)	

For Motion to recall grant petition to file motion for rehearing of time to vacate dismissal (28 USC 2106) and stay

Brief statement of the relief requested:
To recall order of mandate and to restore the complaint under 42 U.S.C. ¶1983 for the minor child Shaune Levine, who had properly been before this court.

ORDER

It is hereby ORDERED that the motion be and it hereby is denied. It is further ordered that no further papers may be filed by or on behalf of Richard Zelma or Shaune Levine in any way relating to No. 93-7803, unless leave of this Court has been previously sought and granted.

Hon. Chief Judge Jon O. Newman

Hon. Judge J. Daniel Mahoney

Hon. Judge Levin H. Campbell
Circuit Judges

date 6/2/95

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEVINE, ET AL.
Plaintiff(s),

against 92 Civ. 1702 (JES)
ORDER

COUNTY OF WESTCHESTER, ET AL.
Defendants(s)

The above-captioned action having come before this Court, and counsel for plaintiff, Richard Zelma, Esq., and plaintiff having failed to appear for Oral Argunent on November I8, 1994, and Richard Zelma having filed a motion to withdraw as counsel, and Richard Zelma having filed a motion for sanctions, and Richard Zelma having filed an application for an injunctlon, and the Court having considered all matters raised, it is

ORDERED that, for the reasons set forth on the record, Richard Zelma's application to withdraw as counsel for plaintiff shall be and hereby is granted, and it is further

ORDERED that, for the reasons set forth on the record, Richard Zelma's motion for sanctions shall be and hereby is denied, and it is further

ORDERED that, for the reasons set forth on the record, Richard Zelma's application for an injunction shall be and hereby is denied without prejudice, and it is further

ORDERED that, defendant may file a motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure and shall serve such motion on both plaintiff and Richard Zelma on or before December 23, 1994,and it is further

ORDERED that plaintiff and Richard Zelma may each file a response to defendants' motion for sanctions on or before January 24, 1995, and it is further

ORDERED that, Oral Argument shall be held on May 5, 1995 at 1:00p.m. in Courtroom 705.

Dated New York, New York

~~November , 1994~~
12/22/94

_____/_S_/_____
John E. Sprizzo
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2 day of March , one thousand nine hundred and ninety-four.

PRESENT: HONORABLE. JON O. NEWMAN,
Chief Judge
HONORABLE J. DANIEL MAHONEY,
HONORABLE LEVIN H. CAMPBELL,*
Circuit Judges

ANDREW LEVINE, ON BEHALF OF
HIMSELF AND HIS NATURAL DAUGHTER,
SHAWNE L. LEVINE, IN A FIDUCIARY
ROLE AND/OR AS HER NEXT FRIEND,
Plaintiff-Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES OF
WESTCHESTER COUNTY, ET AL.
Defendants-Appellees

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* Of the United States Court of Appeals for the First Circuit, sitting by designation.

ORDER

Appeal from the United States District Court for the Southern District of New York (John E. Sprizzo, Judge)

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgement of the District Court be and it hereby is AFFIRMED.

Arthur Levine brings this 42 U.S.C. §1983 action against a host of entities, ranging from the State of New York and North Carolina to various social workers. His claim arises primarily from proceedings in New York family court in which he was found to have abused his child and custody was given to the child's mother. The gravaman of his complaint is that the defendants violated his rights and the child's rights by failing to take steps to correct the family court's allegedly mistaken decision that he was the perpetrator of the child abuse. Levine asserted this theory of "mistaken identity" to the state court on a motion for reconsideration, but the court rejected his claim.

We believe that Levine's federal and constitutional claims are so "inextricably intertwined" with issues resolved in the state court judgments that an assertion of jurisdiction in this case would inevitably require us to reconsider the state court rulings. District of Columbia Court of Appeals v.

Feldman, 460 U.S. 462, 482 n.16 (1983). This we cannot do. "[L]ower federal courts possess no power whatsoever to sit in direct review of state court decisions." Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296 (1970). The relief Levine requests could only be granted if a federal court ruled that the state court erred in its determination that Levine abused the child. Inferior federal courts have no power to review such state court rulings. See Chrissy F. v. Mississippi Department of Public Welfare, 995 F.2d 595 (5th Cir. 1993) (district court had no jurisdiction over section 1983 action that essentially required federal court to set aside state court decisions on custody and abuse), petition for cert. filed, 62 U.S.L.W. 3360 (Nov. 8, 1993) (No. 93-754); Keene Corp. v. Cass, 908 F.2d 293 (8th Cir. 1990) (district court lacked jurisdiction over section 1983 action that required federal court to review state court rulings for correctness); Anderson v. Colorado, 793 F.2d 262, 264 (10th Cir. 1986) (district court lacked the jurisdiction over section 1983 action that "essentially seeks to undo the custody decision of the Colorado state court").

The appeal is frivolous with respect to all defendants, but particularly as to Donna McLeod, the child's mother. Levine's claims against her simply attempt to challenge decisions she made for the benefit of the child in her role as the child's custodial parent. Pursuant to Fed. R. App. P. 38, we award reasonable appellate attorney's fees to McLeod, in an amount to be determined by the District Court and not to exceed the $6,000 estimate reported by MacLeod's counsel at oral argument. We also award normal taxable costs to all defendants.

Hon. Chief Judge Jon O. Newman

Hon. Judge J. Daniel Mahoney

Hon. Judge Levin H. Campbell
Circuit Judges

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

1856w
Z/ep
Argued April 17, 1989

_____ AD2d _____

GUY J. MANGANO, J.P.
WILLIAM C. THOMPSON
GERALDINE T. EIBER
ARTHUR D. SPATT, JJ.

DECISION & ORDER

4390E
4391E
4392E

In the Matter of Shaune L.
(Anonymous).
Westchester County Department of
Social Services, Respondent
Andrew L. (Anonymous), appellant

Richard Zelma, New York, N.Y., for appellant
Marilyn J. Slatten, County Attorney, White Plains, NY (Kenneth E. Powell and Cataldo F. Fazio of counsel) for respondent Westchester County

Department of Social Services.
Maria Joy Frank, Ossining, N.Y., Law Guardian on behalf of the child.

In a child protective proceeding pursuant to Family Court Act article 10, the father Andrew L. appeals from (1) an order of the Family Court, Westchester County (Bellantoni, J.) entered August 25, 1987, which, after a fact-finding hearing, found that the appellant had sexually abused his daughter Shaune L., (2) an order of the same court, dated February 3, 1988, which denied his motion for a new hearing, and (3) a dispositional order of the same court, dated February 24, 1988, which inter alia, released Shaune L. to the custody of her mother and directed that he have no contact with her until further order of the court.

ORDERED that the orders are affirmed, without cost or disbursements.

Upon our review of the record, we conclude that the Family Court's finding of abuse is supported by a preponderance of the evidence adduced at the fact-finding hearing (*see, Matter of Nicole V.*,. 71 NY2d 112, 117; *Matter of Tammie Z.*, 66 NY2d 1, 3). The child related incidents of abuse to the court during in camera testimony (*see, Matter of Tyson G.*, __ AD2d__ [2d Dept. Nov. 28, 1988]; *Matter of Erin G.*,. 139 AD2d 737), and her grandmother testified that she experienced nightmares following the incident (*see, Matter of Nicole V.* 123 AD2d 97, *affd* 71 NY2d 112, *supra*; *Matter of Tyson G.*, *supra*). Validation evidence was elicited from an expert witness indicating the child was exhibiting the characteristics associated with a syndrome experienced by sexually abused

children (*see, Matter of Nicole V.*, 71 NY2d 112., 120-122 *supra; Matter of Erin G.,supra*, at 739; *Matter of Linda K.*, 132 AD2d 149).

Further the Family Court did not improvidently exercise its discretion in denying the father's motion purauant to CPLR 5015(a)(2) for a new hearing based on newly discovered evidence (*see, National Hotel Mgt. Corp. v. Shelton Towers Assoc.*, 111 AD2d 154. *appeal dismissed* 65 NY2d 1053).The evidence relied upon by the father in support of his motion did not meet the criteria for newly discovered evidence (*see, Pezenik v. Milano*, 137 AD2d 748, *app dismissed* 72 NY2d 909, *Matter of Commercial Structures v. City of Syracuse*, 97 AD2d 965).

Finally, we find no basis upon which to disturb the court's determination that the child be released to her mother and that the father have no contact with the child until further order of the court (*see, Matter of Erin G., supra*).

MANGANO, J.P., THOMPSON, EIBER and SPATT, JJ., concur.

ENTER

May 22nd 1989 MARTIN H. BROWNSTEIN
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Dated July 14, 1988

Richard A. Brown, J.P.
Sybil Hart Kooper
Arthur D. Spatt
Thomas B. Sullivan, JJ.

Motion No. 5052

DECISION AND ORDER

In the Matter of Shaune Levine, etc.
respondent.

Andrew Levine, appellant

Motion by appellant to consolidate appeals from three orders of the Family Court, Westchester County, dated August 25, 1987, February 3, 1988 and February 29, 1988, respectively: and for other relief.

Now upon the papers filed in support of the motion, and the papers filed in opposition or relation thereto: it is

ORDERED that the motion to consolidate the appeals is granted; motion denied in all other respects.

The appeal will be heard on the original papers

(including the typewritten stenographic minutes, if any,) and on the typewritten briefs of the parties, whom are directed to file nine copies of their respective briefs and to serve one copy on each other. The typewritten stenographic minutes, if any, of the in camera hearing are to be filed in this court by the Clerk of the Family Court.

Appellant's time to perfect the consolidated appeals is enlarged to the November term. Appeals ordered on the calendar for said term.

Appellant's brief must be served and filed on or before September 6, 1988: and respondent's and the Law Guardian's brief's must be served on or before October 4, 1988.

ENTER

MARTIN H. BROWNSTEIN
Clerk

July 14, 1988 In re Levine, Shaune Mot.No. 5052

The United States Law Week
Supreme Court Proceedings

April 7, 1992
THE BUREAU OF NATIONAL AFFAIRS IN WASHINGTON, D.C.

Volume 60, No. 39

ARGUMENTS BEFORE THE COURT
Family Law

Domestic relations exception to federal jurisdiction

The existence and nature of a domestic relations exception to federal court jurisdiction was debated before the U.S. Supreme Court March 31, as lawyers representing parties in a tort action based on child abuse argued whether a federal court could hear the suit. Having never directly addressed the validity of the domestic relations exception to federal jurisdiction, the court took the opportunity to do so in this case, which stems from the dismissal of two children's federal court damages claim against their biological father (whose parental rights have been terminated) and his female companion. (Ankenbrandt v. Richards, No. 91-367, argued 3/31/92)

Although the case could be decided narrowly on the basis that the subject matter of the claim does not fall within the traditional scope of the domestic relations exception even if it does exist, the attorney for the children claimed that federal court jurisdiction is mandated in any diversity case involving the statutory amount in controversy of more than

$50,000. On the other side, the respondents' counsel argued that the domestic relations exception is derived from the U.S. Constitution, and thus may not be limited by Congress. In the course of the argument, the justices probed the evolution of the concept of the exception and its range, as well as questioning its necessity in light of the doctrine of abstention enunciated by the court in *Younger v. Harris*, 401 U.S. 37 (1971).

Action for Child Abuse

In September 1989, Carol Ankenbrandt filed a tort action in federal court in Louisiana on behalf of her two daughters, then aged eight and five, seeking monetary damages from her ex-husband, Jon Richards (the children's father), and his female companion, Debra Kesler, for alleged sexual and physical abuse. One month earlier Richards' parental rights had been terminated by a Louisiana court based on the abuse. The termination order was not appealed. At the time the federal suit was filed, Ankenbrandt and the children were Missouri residents, and Richards and Kesler were Louisiana residents.

In December 1990, the federal district court in Louisiana granted the motion of Richards and Kesler to dismiss the action based on the "domestic relations exception" to federal court jurisdiction and the *Younger* doctrine of federal abstention. In May 1991, the Fifth Circuit affirmed in a brief unpublished per curiam opinion, declaring that the district court properly declined to exercise jurisdiction. Ankenbrandt appealed to the U.S. Supreme Court. Certiorari was granted January 10, 1992, limited to the questions of: (I) whether there is in fact a domestic

relations exception to federal juridiction; (2) if so, whether it permits a district court to abstain from exercising diversity jurisdiction over a tort action for damages: and (3) whether the trial court erred in abstaining from exercising jurisdiction under the doctrine of *Younger v. Harris*.

Diversity and Divorce

Arguing Ankenbrandt's case, Richard Ducote, of New Orleans, outlined the history of the proceeding, declaring that the case was not about establishing a new cause of action, and that there was no question that all the elements of diversity jurisdiction had been satisfied.

Chief Justice Rehnquist apparently seeking to focus the issue from the start, suggested that one could go further, and say that the case is not about divorce, custody, or probate matters.

Ducote agreed, observing that if the chiidren had been run over by their father in an automobile accident, federal relief would clearly be available. Moreover, he said, a federal forum would be available if the children had been sexually molested by a schoolteacher, or even an uncle, aunt, or first cousin. Why then, he asked, should a federal court be able to abstain from hearing the case just because the alleged tortfeasor is the plaintiffs' father or mother? Under the trial court's approach. Ducote argued, a federal judge can say "I don't want to get involved in this case because it sounds like a family matter."

Justice Scalia asked Ducote if he was suggesting that even if the case were a divorce matter, there may be no

exception to federal jurisdiction.

If the statutory amount in controversy threshold of more than $50,000 is met, Ducote said, then there is federal jurisdiction.

Scalia: So you can sue for divorce in federal court?

Ducote: Not necessarily; the $50,000 threshold must be met.

What if a husband sues for divorce asking for a property settlement of $100,000? Does that satisfy the jurisdictional test? Rehnquist asked.

Ducote: I think that, yes, the federal court has jurisdiction.

Rehnquist noted that the court does not have to decide this particular issue, because there could be a domestic relations exception to federal court jurisdiction with respect to divorce and custody matters, but such an exception may not extend to the case before the court.

Scalia asked whether jurisdiction would lie over a suit for partition of realty in another state.

Ducote again declared that if the diversity and amount in controversy requirements were met, and the applicable state law allowed for such a cause of action, then under congressional mandate thc federal court would have jurisdiction.

When Congress enacted the jurisdiction statute, didn't it take into account the notions of transitory and non-transitory causes of action? Scalia asked.

Ducote replied that most of what courts have said about the domestic relations exception have been on very weak ground. Federal courts, he said, should not be able to define their own jurisdictional boundaries.

Scalia: No, when they invoke the exception, they're just saying that Congress took into account the notion of non-transitory causes of action.

Ducote: Diversity jurisdiction deals with local causes of action.

Rehnquist: This court has stated that when Congress re-enacts a jurisdictional measure, it does so with knowledge of any judicial gloss on it. We have spoken about the domestic relations exception since the turn of the century. Isn't it rather two dimensional to claim that we should just look at the words of the statute?

After emphasizing that the court's only reference to the exception since the 1930s was in a footnote in *Thompson v. Thompson*, 484 U.S. 174, 56 LW 40S5 (1988), Ducote said that it is Congress that must set out the parameters; if we are going to have exceptions and allow for abstention, he declared, it should be done by federal mandate.

Judicial Chaos

Rehnquist asked if Ducote thought the court should

overrule the cases on the domestic relations exception. Ducote replied that the case law has led to judicial chaos, leading to a situation in which a federal court, citing the nineteenth-century case of *Barber v. Barber*, 62 U.S. 582 (1859), can say a tort action for sexual abuse falls under the domestic relations exception. Courts do this on an ad hoc basis, he noted, adding that the children should be able to sue in federal court regardless of who the defendant is.

Suppose, asked Justice Kennedy, that the mother was involved in Louisiana domestic proceedings, and the court found that there was no abuse? Wouldn't that, he suggested, lead to issue preclusion?

Ducote responded that it would not under Louisiana law, but Kennedy pursued the issue, asking whether, if there were issue preclusion and the tort claim were tried first, the domestic relations court would find that the abuse issue had been determined.

Ducote stuck to his theme, stating that the rules of the game should not change merely because the case concerns sexual abuse and families. Were it not a family context, he insisted, the question would not arise. The trial court, he observed, found that because the state had terminated the father's parental rights, the state's interest was even more compelling. But Ducote argued that because Richards is now a stranger to the children, there is even more compelling reason to be in federal court.

Scalia questioned whether, if equitable relief were being sought in addition to the damages, Ducote would believe that the federal court should not address such claim?

He answered that when issues of status are not involved, and the federal court is not asked to impinge of the matter of supervision of a minor, and when it's just a matter of damages, the federal court should decide the case.

Constitutional Basis

Paul S. Weidenfeld, of New Orleans, counsel for respondents Richards and Kesler, began his argument by trying to focus on the established legal principles. The first issue, he said, is whether there is a domestic relations exception. The court said that there is in Barber, he continued, and it reaffirmed this in three cases before 1930. That year, he declared, Justice Holmes again reeffirmed the exception in *Popovici v. Agler*, 280 U.S. 379.

Justice O'Connor asked whether the exception is derived from the Constitution or is statutory. Could Congress change it? She queried.

Weidenfeld stated that he believed the exception goes back to the Tenth Amendment.

Pursuing the issue, O'Connor demanded a yes-or-no answer to the question of whether Congress could direct federal courts to exercise jurisdiction in some domestic relations matters, such as parental kidnapping.

No, Weidenfeld replied, adding that the court had said so in *Thompson*. He went on, however, to retreat slightly from this position, adding "as a caveat" that a kidnapping act may not be considered a domestic matter for purposes of the exception. This, he indicated, is a key point;

what constitutes a "domestic" matter?

Justice Blackmun sought clarification as to whether the discussion was really about abstention rather than a total exception. Are federal courts really not abstaining, he asked from hearing cases over which they actually may exercise jurisdiction?

The court, Weidenfeld explained, has spoken about domestic relations as an *exception* to federal jurisdiction. The issue of what makes a matter "domestic" requires a court to look to the states, he added.

Blackmun: But isn't it dangerous to read into the Constitution an *exception* rather than the power of *abstention*?

Weidenfeld: Congress has never decided to take the matter on. If the court wants to rephrase it, it can.

States have rules, Weidenfeld continued, that abridge the right to sue within families. Indeed, he said, Richards could not have been sued if he had run over his children.

That's a matter of state law. Rehnquist interjected, adding that the result would be the same in a federal diversity proceeding.

Weidenfeld insisted that states have their own rules concerning domestic harmony,and that federal courts have always deferred to the states in this area.

Justice Souter observed that this may be so but that

doesn't make it a jurisdictional rule. He went on to ask if Weidenfeld's criterion for what is "domestic"requires one to look to state law of capacity.

Weidenfeld: That's part of it. States have traditionally barred suits between spouses, and between parents and children. They have wrested control of this area without any question from anyone.

Souter: These are pointers regarding what the trial court may have had in mind, but you're not saying that state capacity law controls jurisdiction?

Weidenfeld: No, but a court needs to ask: Is this a domestic matter, and if so, then the court must not handle it. The trial court's discretion should not be overturned.

Federal Interests

Scalia posed a hypothetical: a wife kills her husband, in the course of which she violates a federal law, such as interstate transportation of a handgun. Would a federal prosecution, he asked, be precluded in such a case?

When Weidenfeld said no, Scalia asked how that case differed from a tort action based on one spouse's hitting the other.

Weidenfeld suggested that the former example involved a federal crime, but Scalia interjected that he was not talking about a specific federal crime of spouse-killing, but the incidental violation of a general handgun law.

Weidenfeld replied that there has never been any case excluding such conduct as a domestic matter. If there were such a ruling, he said, Congress would say this was going too far.

Justice Stevens inquired how many of the court's cases referring to the domestic relations exception were diversity proceedings.

Weidenfeld said that none were.

Kennedy pursued Scalia's line, asking about a case in which a child is battered by a parent and sues to recover medical payments.

Weidenfeld said that this would fall within the exception, as part of the state court unitary system. The family, he insisted, is uniquely within the state's concern. In support of that interest, he continued, states have tried to come up with a unitary way of dealing with matters evolving from domestic disputes. Louisiana, he observed, has compiled its juvenile laws into one tome. The factors in support of the *Younger* doctrine, he went on to say, are based on the idea that you don't want to disrupt this unified body by relitigating matters through federal courts.

A Perfect Case

Rehnquist, returning to Stevens' earlier question, asked Weidenfeld what the basis of jurisdiction in *Barber* was.

Weidenfeld recalled that the basis was

diversity.

Rehnquist: Even in December Term, 1858, this court saw definite limits to the domestic relations exception. Didn't it allow the enforcement of a New York judgment for alimony?

Weidenfeld: Yes. But the issue is whether the matter sued upon occurred during the existence of the marriage. If the facts occurred before the marriage was terminated all matters should be decided in state court.

O'Connor The state court is through with this case; this seems a perfect case for federal diversity jurisdiction.

Weidenfeld: These cases are never over. For a long time, custody judgments weren't even considered final for full faith and credit purposes.

Weidenfeld contended that no abuse had actually been proven in the state juvenile court proceeding, and that Richards had let his parental rights be severed without contest because he was concerned that disputing the charges might jeopardize his defense in criminal proceedings that were also pending in state court. However, Weidenfeld continued, if it were later shown that no abuse occurred, someone ought to go to the state court to ask it to revisit the question of the best interests of the children.

In reply to a question from O'Connor whether a non-parent could reopen the matter in Louisiana, Weidenfeld said that the state could do so.

Scalia noted that there are many tort actions that could be litigated in federal court and have an effect on a custody decree. A stranger, he suggested, could sue a custodial parent in federal court for damages arising from negligent driving or deliberate conduct, which could be used as the basis for a subsequent state court custody modification suit.

My test, Weidenfeld maintained, is whether the conduct occurred during the marriage and whether the state has an interest.

Scalia: Yes, because that fits your case.

Weidenfeld: I know this court has never extended *Younger* to a diversity case, but the state interests in the family have increased as federal interests have decreased.

Rehnquist interjected that for *Younger* to apply, there must be a pending state proceeding, to which Weidenfeld replied that the issue of custody is always open.

Rehnquist: So we don't need a domestic relations exception, if we have an abstention doctrine.

Justice Thomas asked Weidenfeld how the exception, even assuming that it applied to Richards, applied to Kesler.

Weidenfeld said that she was the co-respondent in the prior matrimonial proceedings, and furthermore that the duplication of resources resulting from separate state and federal actions would not be appropriate.

In closing, Weidenfeld said that there needs to be some way to determine what is "domestic," and that this should rest in the discretion of the district court. The district court in this case, he added, did not abuse such discretion.

Reliance of Termination

On rebuttal, Ducote picked up Scalia's point, emphasizing that in many situations the facts leading to a state court action can also result in a federal court suit, such as a state criminal proceeding followed by a federal tort action. If the conclusion reached in the federal suit is different from the state proceeding, he said, there is no reason to reopen the state case. Furthermore, he continued, in this case, Richards' parental rights were terminated, and thus the issue of custody is thus permanently closed as far as he is concerned.

If there had been no termination, O'Connor asked Ducote, would you still be here?

Yes, Ducote said, I don't think the termination issue has any bearing. Finally, he said, it must be determined whether the trial court's action was based on exception or abstention. If it was abstention, he insisted, such action must be based on principles the supreme court has recognized. *Younger* requires a pending state action, and there is none here, Ducote maintained.

JOSEPH L BELVEDERE, ESQ.
R.D. 5, Route 52
Carmel, New York 10512
(914) 225-7937

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDREW LEVINE and SHAWNE L. represented by a Guardian ad litem to be appointed by the Court

v.

COUNTY OF WESTCHESTER et al
DEFENDANTS.

AFFIDAVIT IN SUPPORT OF PLAINTIFFS, PRELIMINARY INJUNCTION AND IN OPPOSITION TO MOTION TO DISMISS
92 CIV 1702
JES

JOSEPH L. BELVEDERE, an attorney of this Court submits this affirmation pursuant to F.R.C.P. 11 on behalf of Plaintiff Andrew Levine and his child Shawne.

That I represented Mr. Levine during the fact-finding hearing in family Court in 1987.

I was at the in camera hearing on July 10, 1987

when the child Shawne testified.

To the best of my present recollection at no time did the child identify Plaintiff Andrew Levine by name. She identified the person who abused her as a "daddy." She further stated that when she last saw her real father was the weekend of Thanksgiving 1986, she did not believe her mommy that her daddy was mean to her then.

As Mr. Levine was not charged with any acts subsequent to December 1, 1986 there was no reason to defend against such acts.

August 26, 1992

JOSEPH L BELVEDERE, ESQ.
R.D. 5, Route 52
Carmel, New York 10512
(914) 225-7937

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

Levine	92 CIV 1702 (JES) & 93-7803
County of Westchester et al	Affirmation in support of Richard Zelma and minor Shawne L.

JOSEPH L. BELVEDERE, duly affirms under the penalty of perjury and pursuant to FRCP 11 as follows:

1. That I represented Mr. Levine at an Article 10 proceeding in 1987. That this led to an in camera dated July 10th, 1987, where the child's testimony was taken.

2. To the the best of my recollection, the child's sole identification of anyone was by referring to the person as "daddy". I specifically do not recall the child identifying Mr. Levine by name at the in camera hearing.

3. I do recall speaking to Mr. Zelma Esq. in 1992 and informing him of my recollection of the in camera hearing of July 10th 1987. That I have re-read my fomer affidavit of August 26th 1992 and stand by those statements.

January 3rd 1996:

JOSEPH L BELVEDERE, ESQ.
R.D. 5, Route 52
Carmel, New York 10512
(914) 225-7937

United States Court of Appeals
Second Circuit

Levine — 96-7747; Affirmation in support of stay; [FRAP 8 (a) (b) & 27(a)].

v

County of Westchester

Joseph L. Belvedere Esq. duly afftrms under the penalty of perjury and pursuant to FRCP 11 as follows on behalf of Richard Zelma Esq. and the child Shawne:

1. That I represented Mr. Levine during the fact finding hearing in family court in 1987.

2. I was at the in camera hearing on July 10th 1987. and the child did testify to being the victim of actual vaginal penetration. However, to the best of my present recollection, the child never identified anyone by name at the in camera hearing. This was also my recollection in 1992 that I made to Mr. Zelma on two occasions, when he had called me on his investigation of what precisely was stated at the in camera hearing, prior to his filing the federal complaint. I also do remember that the child did state that she did not believe her mommie that her daddy was mean to her during the Thanksgiving weekend of 1986. That was the last time Mr. Levine had last seen the child. It was the Thanksgiving weekend of 1986 and all times beforehand that was the subject of the inquiry at the factfinding hearing

respecting the child. There was no notice of any kind to defend Mr. Levine for ostensible conduct which took place subsequent to December Ist 1986. By virtue of this, there was no reason to raise any defense against any act that was impossible to link to before December 1st 1986. That I read my declarations to the district court dated August 26th 1992 and January 3rd 1996, and stand by those statements.

3. It is my hope that this declaration helps and or assists the court on the pending motion.

September 19th 1996:_____

JOSEPH L BELVEDERE, ESQ.
R.D. 5, Route 52
Carmel, New York 10512
(914) 225-7937

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

In the Matter of

SHAUNE LEVINE

AFFIRMATION IN OPPOSITION TO MOTION

Docket No. N-112-87

A Child Under Eighteen Years of Age alleged to be Abused by

ANDREW LEVINE,

Respondent.

----------x

KEVIN G. GRAVES, ESQ. affirms the following under penalty of perjury:

1. I am an attorney duly admitted to practice Law in the State of New York.

2. I am an Assistant County Attorney in the office of the Westchester County Attorney, Henry J. Logan, and am fully familiar with the facts and circumstances of this case.

3. This affirmation is submitted in response to a Notice of Motion with accompanying Affidavit of Andrew Levine submitted by Gertrude E. Belvedere, Esq. counsel for the Respondent, Andrew Levine. (Exhibit "A")

4. Said Affidavit was received by mail at the Office of the County Attorney on March 13, 1987 Such affidavit requests an Order requiring Donna McLeod to submit to psychiatric examination pursuant to section 1046 of the Family Court Act and for an Order restoring visitation between Andrew Levine and Shaune Levine.

5. Respondent's request for an Order requiring Donna McLeod to submit to psychiatric examination to determine her competency to initiate an Article 10 proceeding should be denied. Said Article 10 proceeding was initiated by and continues pursuant to the actions of the Westchester County Department of Social Services. Donna McLeod is not a party to this action. Her status in said matter is that or a potential witness.

6. As a potential witness in said proceedings, if Donna McLeod is called to testify, Respondent through counsel, will have opportunity to examine the witness with regard to all facts relating to the issues before the Court.

7. Section 1046 of the Family Court Act makes no reference to nor provision for the psychiatric examination of a potential witness. Section 1046 provides for specific forms of evidence to be admitted in an Article 10 proceeding. Such specific provisions make no mention as psychiatric examination of potential witnesses.

8. Respondent's request for an Order requiring Donna McLeod submit to a psychiatric examination to determine her competency and fitness to continue as the physical custodian of the child should be denied.

Respondent's remedy to determine any custodial issues is a proceeding Under Article 6 of the Family Court Act. Respondent should not be allowed to cloud the proceedings before the Court by seeking relief which is improper under the existing abuse and neglect petition. Respondents papers indicate the existance of a pending matrimonial action. Such custodial issue is proper within the matrimonial action not the abuse/neglect action.

9. Respondent's request £or an Order resuming visitation with the child should be denied. At present there exist two independent Orders of Protection which prohibit visitation or contact with the child. On December 1, 1986 a Temporary Order of Protection was signed by Judge Scancarelli with regard to a family offense petition filed by Donna McLeod Docket No. 0-2429-86 (Exhibit B). Such petition was based on several allegations including the sexual abuse of Shaune Levine. On January 28, 1987, said Temporary Order was converted to a Permanent Order of Protection (SLOBOD, J.). On January 16, 1987, a Temporary Order of Protection was signed by Judge Barbara L. Kaiser with regard to the abuse/neglect proceeding (Exhibit C). Based on the serious nature of the allegations and the facts presented in Court on three different occassions, three independent Judges of the Family Court have determined that there should be no visitation with the child.

10. On December 29, 1986, Judge Scancarelli dismissed the allegations concerning the child in the Family offense. This was done soley on the basis of representations to the Court by this attorney and Child Protective Services that an investigation was ongoing and the filing of an abuse

petition the Department of Social Services contemplated. Judge Scancarelli was of the opinion that such allegations were more properly under an Article 10 proceeding and therefore dismissed the sexual abuse allegations with the understanding that the County would be filing an abuse petition.

WHEREFORE, it is requested that the Respondents Motion requesting an Order restorinq Respondent's visitation rights; for an Order requiring Donna McLeod to submit to a psychiatric examination to determine her mental capacity and fitness to continue as the physical custodian of the child and/or her competency to initiate an Article 10 proceeding be denied.

Dated: White Plains, New York
March 19th; 1987

KEVIN G. GRAVES
Assistant County Attorney

AFFIDAVIT OF DAVID D. ROBIN

On July 15, 1994, I participated in a conference telephone call with Richard Zelma and Andrew Levine. I was previously advised by Mr. Zelna that he represented Mr. Levine in litigation. The case had gone on appeal and apparently the next step was an appeal by writ of certiorari to the United States Supreme Court.

During this conversation I declare under penalty of perjury that the following:

(1) Andrew Levine told me that he was no longer interested in pursuing the appeal if it was going to cost him any more money. When I questioned him specifically on the fact that his case would end if the appeal was not taken he acknowledged that he was not interested "I've spent too much on this already." I thereafter established that due to the time constraints involved in filing a writ with the Supreme Court Mr. Levine had effectively terminated Mr. Zelma as his counsel of record on the case. Mr. Zelma and Mr. Levine both acknowledged the termination of the attorney-client relationship.

(2) I further advised Mr. Levine that he could have other counsel review the file for other options. Mr. Zelma suggested that Mr. Levine either pick up the file or allow it to be delivered to Mr. Levine. Mr. Levine stated he wasn't interested in either retrieving the file from Mr. Zelma or having it delivered to him.

(3) Mr. Zelma and Mr. Levine each agreed and promised to

restrain themselves from contacting the other following this conference call. It was Mr. Zelma's desire that Mr. Levine no longer contact him and it was also Mr. Levine's desire that Mr. Zelma no longer contact him with regards to the case.

(4) On the evening of July 15, 1994, Richard Zelma called me to advise that Mr Levine already broken his promise by leaving two messages on Mr Zelma's automated voice-mail. To confirm this Mr Zelma insisted that I listen to the messages. He provided me with his access code to his NYNEX voice mail system and I did listen to two messages left by Mr Levine. The NYNEX system date and time stamps messages and I determined that the first message was left at approximately 9:00 PM and the second message was just after midnight The second message references a telephone call I supposedly made to Mr Levine following the conference call earlier that day. No such call was made by me.

I have read the above two pages of affidavit and attest it is true and correct.

Dated July 28, 1994

DAVID D ROBIN
Attorney at Law
Admitted - California bar#096622

SUPPLEMENTAL AFFIDAVIT OF DAVID D. ROBIN

I, David D. Robin, duly affirm under penalty of perjury the following:

I have been asked to expand certain statements made in my Affidavit of July 28, 1994. First, I have re-read my affidavit of July 28, 1994, and I still have a good recollection of the conversation {copy of the July 28, 1994 affidavit is attached). The purpose of the three-way conversation with Mr. Zelma and Mr. Levine was to assist them in communicating their respective positions with regard to the lawsuit known to me as Levine vs. County of Westchester *92 Civ-1702*. Mr. Zelma had related to me his concern regarding his professional obligations and wanted Mr. Levine's statements made to a third party so that there would be no misundorstanding at a later date. I agreed to be the third party and offered to set up the conference call.

Following my conversation with Mr. Zelma, I first called Mr. Levine and explained to him the purpose of the telephone call. He readily agreed to have me join in a conference call between he and Mr. Zelma. I then placed a call to Mr. Zelma and the conversation described in my July 28, 1994 affidavit occurred.

Throughout the conversation I had every reason to believe both Mr. Zelma and Mr. Levine understood the statements made and that the attorney-client relationship between them had ended. I clearly recall that Mr. Levine was not interested in picking up the litigation file from Mr. Zelma's office nor was he even interested in having it delivered to him.

At the conclusion of the convorsation, cordial goodbyes were said by all three of us and the conversation ended. I have no reason to believe any part of this conversation was misunderstood by either Mr. Zelma or Mr. Levine.

Dated: May 31, 1995

DAVID D. ROBIN

April 13, 1994
2741 East 28th Street
Brooklyn,New York 11235

Mr. Richard Zelma, Esquire
221 West 82nd Street
New York, New York 10024

Dear Richard:

This letter will confirm your continued authorization to represent me and my child Shawne Levine, who had testified to vaginal penetration on July 10th 1987 at an in camera hearing. At that time and at the present time I have extraordinary difficulty in accepting the fact that the rape happened because the County of Westchester, Law Guardian, and the state judges have ignored the professional opinions alarming them of the seriousness fact that my child was abused by her stepfather after I last saw her, and the fact that she told Judge Bellantonni that she was raped. Judge Bellantonni stated that "... although the child indicated that she was raped, I cannot find the respondent responsible." The judge also stated that "... it is impossible for the child to have been brainwashed and that it had to have happened". Upon this fact the judge, county and law guardian have not fulfilled their duties to investigate this rape. I have been restrained from seeing my child as of the Monday following the Thanksgiving weekend of 1986.

You have informed me on March 2nd, 1994 of the Circuit Court order, and I have received a copy of the same. You also sent me a copy of the petition of the rehearing. On April 8th, 1994, you informed me of Sprizzo's denial of McLeods

request for sanctions and attomey fees. You have no idea how pleased I am that this motion was denied.

I do not believe that this case is a waste of judicial resources, and am confident that the Circuit Court will see their obvious error(Arthur, family, relitigation, etc.) I fully support our continued efforts regarding this matter on both my behalf and Shawne's behalf.

Enclosed you will find a bill that I received from North Carolina. We will discuss how to approach the psychiatrist in North Carolina regarding the sexual and physical abuse to Shawne Levine caused by all six defendants.

Thank You,

Andrew Levine

OFFICE OF THE DISTRICT ATTORNEY
THE COUNTY OF KINGS

Grand Jury Unit
360 Adams St.
Brooklyn, NY 11201

ANDREW LEVINE
2741 EAST 28TH STREET, APT 92H
BRKLYN, NY
11235

GJ CASE NU. 714/87

DOCKET NU. /KOO3233

PLEASE BE ADVISED THAT ON MARCH 6, 1987, A MATTER PENDING BEFORE THE GRAND JURY OF THE COUNTY OF KINGS ENTITLED PEOPLE VS. ANDREW LEVINE WAS DISMISSED BY THE GRAND JURY.

ASSISTANT DISTRICT ATTORNEY
IN CHARGE - GRAND JURY UNIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LEVINE, ET AL.

Plaintiffs,

- against -

92 CIV 1702 (Sprizzo-JES);
93-7803

COUNTY OF WESTHCHESTER, ET AL.

Defendants

----------x

Please Take Notice that Appellant, Mr. Zelma and on his behalf, and on behalf of the plaintiff child Shaune L., hereby appeals to the United States Court of Appeals for the Second Circuit, the decison; order; and judgment dated January 31st, 1996; and the order of the same district court date Feburary 20th, 1996, denying appellants motion under FRCP 59.

Dated March 15, 1996
To: Parties set out in
Certificate of Service

Richard Zelma (0908)
Attorney for Appellants
221 West 82nd Street
New York, NY 10024
(212) 595-1928

RECEIVED MARCH 15, 1996 S.D. OF NY

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REPLY ARGUMENT

I. THIS COURT HAS THE ABSTRACT POWER TO CHANGE THE LAW OF THE CASE. IT HAS THE "POWER TO REACH A RESULT INCONSISTENT WITH ITS DECISION ON THE FIRST REVIEW."

Appellant obtained appellees brief on February 7th 1997. This reply is timely filed on February 11th. [FRAP 31(a)]. Appellees' ignore appellants brief, and each of the points, claiming that this court's order of March 2nd 1994 is the "law of the case". [App. 25-27; see reply brief page 10 footnote 6 and page 6 footnote 3]. This incorrectly sets forth the standard of review for the"law of the case" doctrine. As has been the law in our Circuit Courts and the Supreme courts for over the past 150 years:

" We find *no occasion to doubt that abstract power of an appellate court, upon a second review*, to reach a result inconsistent with its decision on the first review of the same case; *but this is a power* to be exercised very sparingly, and only under extraordinary conditions." [*General American Life Ins. Co.*, v *Anderson*, 156 F. 2d 615, at 619 (CA6) (1946) McAllister J., citing *Messenger* v *Anderson*, 225 U.S. 436, 444; 32 S. Ct. 739; 56 L.Ed 1152 (1912)]. As Justice Holmes set forth in *Messenger* v *Anderson* in 1912:

> " The judgment of the lower court was pleaded, but it was held by the Circuit Court of Appeals after the affirmance by the Supreme Court that its own previous decision was the law of the case and that it was not at liberty to reverse judgment even if the matter was *res judicata on* the principle laid down in *New Orleans* v *Citizen's Bank*, 167 U.S. 371, 396 (1897); see *Parrish* v *Ferris*, 2 Black 606 (1862)]. In the absence of statute the phrase, **law of the case**, as applied to the effect of previous orders on the later action of the court rendering them in the same case, **merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.** emphasis added, *King* v *West Virgina*, 216 U.S. 92, 100 (1910); *Remington* v *Central Pacific R.R. Co.*, 198 U.S. 95, 99, 100 (1905); *Great Western Telegraph Co.*,v *Burnham*, 162 U.S. 339, 346 (1896). **Of course, this court, at**

least, is free when the case comes here. *Panama R.R.R. Co.*, v *Napier Skipping Co.*, 166 U.S. 280 (1897); *United States* v *Denver & Rio Grande R.R. Co.*, 191 U.S. 84 (1903)].

The Supreme Court in Messenger "reversed" judgment.[*Messenger id.* at 445].

The Second Circuit has followed this precise test for the past century as well. [*United States* v *Fernandez*, 506 F. 2d 1200 at 1203 (1974)]. Although the district court is without power to change the law of the case, " that does not finally dispose of the issues, however. An issue decided on a prior appeal is not foreclosed with all the finality of *res judicata* when the case comes back to this court. Although the district court may not change our mind for us, we may ourselves do so. [*Fernandez id.* at 1203].

> "[T]he federal doctrine of the *law of the case* merely expresses the practice of federal courts generally to refuse to reopen what has already been decided, not a limit to their power. The doctrine embodies a salutary rule of practice that when a federal appellate court has established a rule of law for the case at bar it will not, on a successive appeal, depart therefrom in deciding the same issues, *except for cogent reasons*. In brief, the doctrine *does not rigidly bind the appellate court*, but is addressed to its good sense, *and the court will depart* from its prior legal pronouncements *when the circumstances of the case warrant.* " [emphasis added *Fernandez id* at 1203 quoting **1B J. Moore, Federal Practice**, ¶ 0.404[10] at 573-74(footnotes omitted)].

"This has been the Supreme Court's view on the subject". [*Fernandez id.*at 1203 citing *Southern Ry* v *Clift*, 260 U.S. 316,319 (1922); *Messenger* v *Anderson*, 225 U.S. 436, 444 (1912)]. The Second Circuit found ample support in prior cases as well. [*Fernandez id.*at 1203 citing *Johnson* v *Cadillac Motor Car Co.*, 261 F. 878 (CA2) (1919); also see *Slotkin* v *Citizens Cas. Co. of New York*, 614 F. 2d 301, at 312 (1979) citing *Dictograph Products Co.* v *Sonotone Corp.*, 230 F. 2d 131, 134-136 (CA2), petition for *cert.* dismissed per stipulation, 352 U.S. 883 (1956) also citing *Messenger supra* and *Leroy* v *Sabena Belgian World Airlines*, 344 F. 2d 266,

274 (CA2) *cert denied.*, 382 U.S. 878 (1965)]. This principle is well received by all circuit courts. [see i.e. *Merritt* v *Mackey*, 932 F. 2d 1317, at 1320 (CA9) (1991); *United States* v *Houser*, 804 F. 2d 565, 567 (CA9)(1986); *United States* v *Maybuser*, 735 F. 2d 366, 370 (CA9) (1984) *cert. denied*, 469 U.S. 1110 (1985); *Kimball* v *Calahan*, 590 F. 2d 768, at 771-72 (CA9) (1979); *Richardson* v *U.S.* 841 F. 2d 993, 997 (CA9) (1988)].

The law of the case doctrine for the present case appears to be far more lax than in other cases, as this is merely a continued litigation with the same precise parties; same judges; and the same rights of a child, who was allegedly raped by her stepfather in 1987, for which there has never been any prior proceeding or investigation by virtue of a conflict of interest. " In a case such as this, when a party seeks reconsideration of questions decided at an earlier stage of a *single continuing litigation*, the law allows courts *more discretion* than a case in which the party wants to upset a final judgment in another proceeding before another judge. [*Arizona* v *California*, 460 U.S. 605, at 644, (1982) Brennan, Blackmun, Stevens, J.J.J. concurring and dissenting in part citing **1 B. J. Moore & T. Currier, Moore's Federal Practice, ¶¶** 0.401,0.404[1]]. This especially holds true when correcting the law of the case cures a "manifest injustice". [*Arizona id*; also see *Christianson* v *Colt Indus. Operating Corp.* 486 U.S. 800, 817 (1988)].

This is at issue now for both the appellant and the minor child. The same tribunal was present with the same plaintiffs and defendants. The continuous litigation has been altered by virtue of new case law throughout the country recognizing that the field of domestic relations can raise a case and controversy under Article III, and can be resolved in federal court. [see page 5 of January 21st 1997 brief citing *Davis; Mussari; Jeaninie B; Sage; & Freestone*]. Moreover, Congress itself has recognized that private parties do have rights in this field, and have stated their dissatisfaction with the ruling in Suter. Lastly, by the Supreme Court accepting jurisdiction in *Freestone*, this in and of itself, strongly supports the point that a cause of action for private parties in the field of domestic relations, under ¶ 1983, cannot be deemed to be "frivolous" as a matter of law. [116 S. Ct. 1671 (1996)].

Therefore, pursuant to well established case law for the

past century, this court always has the power to re-evaluate its prior decision. It is not barred from doing so by the law of the case doctrine. It is maintained that the new area of law has been misunderstood by the court and that this will be made more clear by the pending case that was just argued before the United States Supreme court on January 6th 1997. [see entire brief of appellant citing and relying on *Ankenbrandt; Maine; Wilder; Wright; Middlesex; Suter; and Blessing v Freestone*, # 95-1441 & *Deshaney*; *Youngberg*; *Canton*; & *Stiver*]. [1]

The new case law that is pending before the Supreme Court in this field of legislation [*Blessing* v *Freestone, cert. granted* 116 S. Ct. 1671 (1996) # 95-1441 *passim*], may support the point that there was always proper original subject matter jurisdiction under federal statutes passed by Congress pursuant to the Child Abuse Prevention Treatment Act. [42 USC 5106a(b)(2) & 5106c(b)(1)]. If the new case law would do this, then, it is very respectfully submitted to this court that the imposition of sanctions and or the finding that the case was "frivolous" is a "manifest injustice". This would permit the court to reconsider issues already decided. One cannot be punished for properly relying on existing law. [*BMW* v *Gore Jr.* 116 S. Ct. 1589 (1996) Point X pages 55-57 of appellants brief dated January 21st 1997]. And, as at all times maintained, if the Supreme court's ruling in *Freestone* establishes that a private party has standing under federal

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[1] The affirmance by this court on March 2nd 1994 is an unpublished decision notwithstanding the statements made by Ms. Duker.[see pages 2 & 4 of opposition brief dated February 3rd 1997; "22 F. 3d 1090"]. There are 31 unpublished decisions on page 1090 and another 38 unpublished decisions on page 1091. In fact, Judge Sprizzo in his decision of January 31st 1996, specifically cites this court's decision by simply setting forth the docket # 93-7803.[App. 537]. Secondly, Ms. Duker was given written notice respecting the "joint appendix" on January 7th 1997, as FRAP 30 (b) sets forth. She never responded and or made any objection to the notice.[Cf. page 2 footnote 1 of February 3rd opposition brief]. Appellant paid for the costs of the appendix, and appellee at all times had every opportunity to include any portion that she wished pursuant to FRAP 30 (b). The "independent relevance" of the appendix was spoken for by appellant. [FRAP 30 (a), please see page 18 ft. note 12 to appellants brief dated January 21st 1997].

statutes to allege a cause of action and name state officials under ¶ 1983, then the case should be restored on behalf of the child. This is despite the undisputed abandonment of the case by Mr. Levine on July 15th 1994. [App. 117]. The remaining points and parts of the brief are respectfully reiterated and incorporated herein by this reference.

II. IF THE SUPREME COURT IN FREESTONE ACKNOWLEDGES PRIVATE CAUSES OF ACTIONS IN THE FIELD OF DOMESTIC RELATIONS, WITH THE NAMING OF STATE OFFICIALS AS PROPER DEFENDANTS, THEN THE EXISTING LAW OF 1992 THAT APPELLANT HAD AT ALL TIMES RELIED UPON WOULD PROVE TO BE ACCURATE. IT WAS AND IS NECESSARY TO HAVE RAISED THESE LEGAL AND FACTUAL POINTS IN ORDER TO PROPERLY "PRESERVE" THE RECORD. THIS IF FOR THE RIGHTS OF THE CHILD AND FATHER, AND TO ESTABLISH THAT THE COMPLAINT AND APPEAL WAS NOT FRIVOLOUS BUT PREDICATED UPON EXISTING LAW. [FRCP 11].

If the above premise holds to be accurate, and if this is done with the Supreme court not reversing *Suter,* then question # 12 in appellants brief which was cited by appellees, is relevant and dispositive of the entire case respecting sanctions. [see opposition brief page 11]. Appellees entire argument is one dimensional. Their entire thrust is that an attorney should be sanctioned if "an attorney continues to file groundless and repetitive claims." [see page 11 of opposition brief dated February 3rd 1997]. Two such declarations that the lower court and Ms. Duker claim to be frivolous and or repetitive, are dated November 2nd 1995 and December 12th 1995. The first goes over the import of Jeanine B. v Thompson, a district court's opinion that recognized that 42 USC 5106 (a)(b)(2) was actionable under ¶ 1983. [App. 497, and App. 517 and 518, see *Jeanine B* v *Thompson,* 877 F. Supp. 1268, at 1285-1286 (1995)].

The second declaration of December 12th 1995 informs the court of *U.S.* v *Sage,* a decision rendered by the district court on October 3rd 1995, and *Freestone* v *Cowan,* a published opinion rendered by the Ninth Circuit on October

12th 1995. [please see entire brief of appellants dated January 21st 1997 citing *U.S.* v *Sage*, 906 F. Supp. 84, at 92-93 (1995) affirmed 92 F. 3rd 101 (CA2) (1996); and *Freestone* v *Cowan*, 68 F. 3rd 1141 (1995) *cert. granted, Blessing* v *Freestone*, 116 S. Ct. 1671 # 95-1441 (1996)]. The legal import of *Sage* is that it reviewed the 10th amendment and *Ankenbrandt*, and found that the case was actionable in federal court in spite of the defendants claim that the domestic relations exception doctrine, and the 10th amendment, barred the federal statute from being enforced in federal court. The district court in *Sage*, made certain to rely on *Ankenbrandt* to demonstrate that the domestic relations exception doctrine does not govern the Congressional statutes that were before her, and rejected the 10th amendment as an affirmative defense. [*Sage, supra* 906 F. Supp, at 92-93 (1995)]. The crucial import of *Freestone*, is that the 9th Circuit distinguished *Suter*, and found a domestic relations statute enforceable under ¶ 1983 for private parties against state officials. This precise issue is now pending before the United States Supreme Court. [*Blessing v Freestone*, # 95-1441, please see appellants brief page 5 citing the 5 crucial cases after Ankenbrandt and the Congressional hearings of October of 1994].

Appellees, as well as the lower court, fail to understand the legal import of properly "preserving" arguments. They have failed to further understand that the law in the field of domestic relations has been expanded and or has changed by virtue of Ankenbrandt, and that further legislation was passed by Congress under the Spending and Commerce Clause to the Constitution of the United States, that were found to be actionable in federal court. *Appellees still believe* that the main point of their leading brief in 1993, that "Barber" precludes any domestic relation issue from being determined in federal court, by virtue of the domestic relations exception doctrine, is viable and correct. It is their contention that the domestic relations exception doctrine originated from the 10th amendment. [please see page 23 of January 21st 1997 brief, and Point I page 1 of reply brief to this court dated December 14th 1993, respecting the leading brief by appellees relying upon *Barber* v *Barber*, 21 How., 582, 16 L.Ed. 226 (1859)]. These former legal positions have been totally rejected by the United States Supreme court in 1992, when it set forth the new jurisdictional "divestment" doctrine as it pertains to the field of domestic relations, and limited this to

the rendering of the decrees of alimony; custody; and divorce. [*Ankenbrandt* v *Richards*, 504 U.S. 689, at 703 (1992) **passim**, January 21st 1997 brief]. The entire Supreme Court made clear furthermore, that in no fashion can the Constitution impede Congress from passing federal statutes in the field of domestic relations. [Point I (a) pages 25-32 of appellants brief dated January 21st 1997; *Ankenbrandt* v *Richards*, 504 U.S. 689, at 695 & 697 (1992)].

It was appellants position to bring these points to the attention of the court in order to correctly preserve the record. Otherwise, these points would be lost on the appeal. [see i.e *Haynes* v *United States*, 418 F. 2d 1380, at 1382 (Ct. Cl.) (1969) citing *Chicago & E.Ill. R.R.* v *Southern Ry.*, 261 F. 2d 394, 402 (7th Cir. 1958); further citations omitted; also see appellants brief Point V pages 47-48 citing *Holly Farms Corp.* v *N.L.R.B.* 116 S. Ct. 1396, at 1402 ft. note 7 (1996) Ginsberg J. citing *Matshshita Electric Industrial Co.* v *Epstein*, 116 S. Ct. 873, 880 ft. note 5, (1996); further citations omitted]. FRCP 11 does not permit sanctions to be imposed when the complaint is supported by "existing law". This would also be contrary to the constitution. " 'To punish a person because he has done what the law plainly allows him to do is a **due process violation of the most basic sort**" ' [see *BMW* v *Gore*, 116 S. Ct. 1589 at 1597-98 ft. note 19 (1996) quoting *Bordenkircher* v *Hayes*, 434 U.S. 357, 363 (1978); see appellants brief page 56]. Appellees contentions are without merit, and the lower court has abused his discretion in refusing to discuss the leading cases of our nation that have adopted the interpretation of Ankenbrandt; and or have distinguished and or ignored Suter. The lower court has further erred in failing to discuss the power of Congress to pass binding statutes in the field of domestic relations, when they condition the provisions of such rights to the rules and principles established by the Supreme Court for the past century. [see Point I (a) & (b) pages 23-46 of appellants brief dated January 21st 1997].

Appellants interpretation of *Ankenbrandt; Maine; Wilder; Pennhurst I; Golden State; Wright; Suter; Middlesex; Deshaney; Youngberg; and Canton;* is very likely to be correct; fully supporting a private cause of action in the field of domestic relations, which was not the case before June 12th 1992. For the reasons set forth in Point I (a) & (b) and Point II, III and IV of appellants brief dated January 21st 1997,

there was proper original subject matter jurisdiction under federal statutes and the constitution. These points are properly preserved for the record.

III. THE RECORD REVEALS APPELLANTS ATTEMPT TO REVEAL TO THE LOWER COURT IMPORTANT MATERIAL TO DEMONSTRATE THAT THE CASE IS WORTHY TO BE RESTORED.

Appellees contention is that sanctions are warranted by virtue of "the numerous lengthy filings submitted by appellant by which he continues to re-assert meritless legal arguments." [opposition brief page 4]. Appellants brief and appendix demonstrates that " the lower court objected to appellant informing him of recent cases on the subject; and the statistics that Congress relied upon in passing statutes in the field of law; and informing him of recent events published by the New York Times respecting victims of abuse." [see appellants brief page 21 ft. note 21 citing App. 537 & 538; App. 497-520; 490-496; 534 & 534a-c].

It is the duty of an attorney to inform a judge of his or her legal mistakes. Indeed, the New York Law Journal in a most recent article discussed the **"Duty to Alert a Judge to a Mistake"** and cited numerous cases and rules to the Code of Professional Responsibility. [App. 530; please see article in NYLJ dated May 13th 1996 attached to declaration of June 14th 1996 as Exhibit "F"].

IV. THE FAILURE TO APPEAL THE CASE TO THE SUPREME COURT AS A MATTER OF LAW CANNOT BE BLAMED UPON APPELLANT RICHARD ZELMA. THE ABANDONMENT OF THE CASE BY LEVINE ON JULY 15TH 1994 CANNOT BE IMPUTED UPON THE CHILD AS A MATTER OF LAW. HER RIGHTS OVERRIDE THE PARENTS, AND MUST BE GIVEN "PARAMOUNT IMPORTANCE". [*Comer* v *Comer*, 14 Cal. App. 4th 504, 927 P. 2d 265, 270 (1996)].

Appellee raises the significant factual point that from the outset, the primary condition that Mr. Zelma made to Mr. Levine was that he obey the court orders of restraint, and that

appellant would represent him and his child to the best of his ability. [see opposition brief page 16 and see pages 36-37 of appellants brief citing *Doran* v *Salem Inn*, 422 U.S. 922, at 925,928 (1975) citing *Steffel* v *Thompson*, 415 U.S. 452, 455-456 (1974) App. 346 & App. 453-474 & 577-580].

However, what appellee fails to comprehend was that Mr. Levine did not condition his "conspiracy" concept until July 29th 1994. [App. 375]. This was after he had terminated the attorney-client relationship on July 15th 1994. [App. 371; App. 381; & App. 486 & App. 117]. Prior to July 15th 1994, Mr. Levine was in 100% agreement with the manner in which the entire case was being handled. Ms. Duker has failed to acknowledge the letter of Mr. Levine dated April 13th 1994. [App. 373]. The termination by Mr. Levine on July 15th 1994, precluded appellant from filing a petition for certiorari dated August 8th 1994. It is conceivable that the Supreme Court would have granted certiorari and remanded the case simply in one paragraph by virtue of the Ankenbrandt case. It is further possible that one of the questions posed in the proposed petition for certiorari would have led to the issue of whether the child was constitutionally entitled to be represented by a guardian ad litem.[App. 317 question # 6].

The filing of the complaint of July 8th 1992 was brought on behalf of the child as well as Mr. Levine. There was no order of "custody" by any state court as Ms. Duker claimed in her memorandum of law. [see App. 452, see page 16 of appellants brief and App. 447 (e)]. It is hornbook case law that a parent has standing to raise the rights of the child, and the child is brought to the courts attention through that parent. [See *Everett* v *Everett*, 57 Cal. App. 3d 65, at 70 ft. note 8 (1976) see page 48 of appellants brief]. It is furthermore appellants contention that if Mr. Levine abandoned the case on July 15th 1994, and if private parties do have rights under ¶ 1983 for violations of federal rights created by statute, then the rights of the child must be re-examined as of July 8th 1992 when she was brought into the court by Mr. Levine. **Mr. Levine lacks the power or authority to remove or surrender the separate and "independent" rights of the child.** [See i.e *Camacho* v *Camacho*, 173 Cal. App. 3d 214, at 220, (1985); *In re Marriage of Lippel*, 51 Cal 3d 1160 at p. 1172, fn. 4 (1990), citing *In re Marriage of O'Connel*, 80 Cal App. 3d 849, 856 (1978)]. Her rights have never been legally

"closed". [see page 46 ft. note 25 in main brief dated January 21st 1997 comparing *Reynoldsville Casket Co.,*v *Hyde*, 115 S. Ct. 1745, at 1751; 64 U.S.L.W. 4408 at 4411 (1995)].

Appellees have admitted that the lower court made a legal mistake in concluding that this court awarded sanctions to be solely imposed upon Mr. Zelma. [see opposition brief page 13-15]. What she fails to address is the constitutional right for proper notice to a hearing on the precise issue of sanctions; a proper hearing of when the attorney-client relationship terminated; and a hearing on whether appellees have legal standing to request sanctions, if the child was indeed raped and otherwise sexually abused by the stepfather, after they obtained restraining orders. [see Point VII of appellants brief pages 52-53 citing *Satcorp* v *China International,* 101 F. 3d 3, (1996) and Point VI of main brief citing *In re Damico,* 7 Cal. 4th 673, at 685 (1994)].

Appellees have failed to mention or discuss the perjured and inconsistent statements of the appellee Ms. Frank. She only claimed on August 4th 1992 that the child had identified Mr. Levine by name at the all important in camera hearing of July 10th 1987. [App. 254 ¶ 13; see January 21st 1997 brief pages 9-23]. This is inconsistent with her own statement made on the day of the in camera hearing itself. [see January 21st brief page 17; see App. 267]. This was furthermore, specifically refuted by the several declarations to the federal court by a person that has personal knowledge of the events that took place at the in camera hearing. [January 21st 1997 brief page 17 ft. note 11 App. 216-224, re; affidavits of Mr. Belvedere Esq.]. Furthermore, appellee has never disputed the fact that McLeod admitted on July 28th 1992, that neither Mr. Levine nor the undersigned had ever had any personal contact with the child after December 1st 1986. [App. 248 ¶ 15]. This makes the testimony from the child revealing that she was raped at the in camera hearing of July 10th 1987, medically impossible to attribute to Mr. Levine. [App. 47-48 and App. 234-235]. Appellees have failed to address these points in their opposition brief. Their position that appellants brief is an attempt to "re-appeal jurisdictional issues and the legal merits of the underlying action", is totally without merit. [see page 6 footnote 3 of opposition brief dated February 3rd 1997, and compare Points V; VI; VII; VIII; IX; X; and XI of January 21st 1997 brief by appellant].

V. APPELLEES CONTINUE TO CONCEAL THE BEST INTERESTS OF THE CHILD. THEY IGNORE THAT SHE WAS RAPED, AND THAT THE CULPRIT COULD NOT HAVE BEEN THE BIOLOGICAL FATHER, BUT INSTEAD, WAS THE FORMER STEPFATHER. A HEARING ON THIS ISSUE IS NECESSARY AND PROPER.

For the reasons set forth in appellants main brief, and as supported by Point IX and VII, a hearing to determine once and for all whether the child was raped by her stepfather in 1987, is warranted. If this is accurate, then appellees lack standing for any request respecting sanctions, and the case is worthy to be restored on behalf of the child. "Aiding and abetting" and continuing to conceal the rape of the child, is a felony, and is "misconduct worthy of punishment." [see i.e *People* v *Cooper infra* Point VI, and *Delta Airlines* v *Colbert*, 692 F. 2d 489, 490 (7th Cir.) (1982)]. All costs and attorney fees are appellees responsibility. Appellant has at all times argued that the case is worthy to be restored. Obviously, this "challenges" the award of sanctions, whether it be $100.00 or $1 million.[cf. opposition brief page 9 ft. note 5, and page 13 ft. note 8].

VI. THE COMPLAINT WAS BROUGHT AGAINST 6 NAMED DEFENDANTS. TO HAVE FILED A PROPER COMPLAINT AGAINST EACH OF THE OTHER DEFENDANTS AND OR 4 OF THE REMAINING DEFENDANTS, DISPELS THE QUESTION OF SANCTIONS. "AIDING AND ABETTING" A FELONY IS IN AND OF ITSELF A FELONY. IT WAS CONTINUOUS AND ONLY CEASED IN AUGUST OF 1987.

Appellants brief points out on numerous occasions that the complaint was filed against 5 other defendants. [see page 6 & 23 of January 21st 1997 brief]. The claim against McLeod was predicated upon the pendant state case. [see i.e. *Sellery* v *Cressy*, 48 Cal. App. 4th 538, 55 Cal. Rptr. 2d 706 (1996) at page 50 of appellants brief]. There can be no disputing the minimum contacts as spelled out in appellants brief as it pertains to all of the defendants including McLeod. [see point VI pages 48-51]. Furthermore, there still has never been any dispute of the alleged fact that the child was the victim of rape and sexually abused, with it primarily

happening in 1987. If this premise holds to be accurate, then McLeod herself would be an "aider and abettor" and be guilty of a felony. [see i.e *People* v *Cooper*, 53 Cal. 3d 1158 at 1166 (1991); App. 526, and page 51 ft. note 26].

"The prosecutor must show an aider and abettor intended to facilitate or encourage the principal offense prior to or during its commission." [*Cooper, id* at 1160]. " For purposes of determining liabilty, the commission of a robbery continues until all acts constituting the offense have ceased." [*Cooper id* at 1164]. At bar, just as in *Cooper*, there are two necessary elements: "gaining possession" of the child, and "asporting or carrying" her away. [*Cooper id* at 1165 citing i.e. *People* v *Perhab*, 92 Cal. App. 2d 430 (1949)].

This is precisely the core of the allegations at bar. The child is alleged to have been healthy before December 1st 1986, and was only abused afterwards by the "stepfather". This was orchestrated by McLeod in order to blame the biological father and make a clean "getaway" with the assistance of the governmental officials. They believed Mcleod, and negligently investigated the issue of who the child was speaking of, when she informed them of a "daddy" that continuously abused her, primarily in 1987. The child held the secret identity of the culprit. The defendants assumed that the only person that the child identified as her "daddy", was the biological father Mr. Levine. They never considered the possibility whether the child meant somebody other than Mr. Levine when she used the common term "daddy".

The major error is seen when one examines the testimony of the child on July 10th 1987, when she for the first time stated that a "daddy" inserted his penis inside of her "and it hurt", and further stated that she "did not believe her mommie that her daddy before Thanksgiving was mean to her." [January 21st 1997 brief Statement of Facts and *Summary of Argument* **pages 17-23**]. As fully discussed in appellants brief, and as set forth on the face of the complaint, it is clear that the child was being abused in classic form by her stepfather, and it all took place after she and the biological father were restrained from each other by court orders of restraint, when her statements are read in conjunction with the: medical evidence of Dr. Schwartz; the admission by McLeod; [App. 234; App. 248]; the expert evidence of Dr. Sgroi and Dr. Green; [App. 157-164]; and the arrests of the stepfather

on December 26th 1986 and July 2nd 1987. [App. 233a-239]. This takes this case outside the general public, [*cf. Deshaney*]; and away from any class action claim, [*cf. Suter*]; and fully supports the filing of the complaint for the two private individuals under ¶ 1983, for federal constitutional and statutory grounds. [*see Blessing* v *Freestone*, # 95-1441, oral argument of January 6th 1997, included in Appendix, pages 547-602].

The facts that are alleged in the complaint and fully supported by reliable evidence warrants an "investigation and prosecution" of the alleged rapist and or culprit. [42 USC 5106a(b)(2) & 5106c(b)(1)]. This is what the federal statutes mandate. The child and the biological father are third party beneficiaries to the contract, and gave the defendants notice of this as of December 7th 1987. Moreover, by virtue of the strong likelihood that the abuse occurred after governmental restraint by court order, all of the defendants are state actors as of December 7th 1987. The special relationship was continuous and terminated on June 4th 1989. The statute of limitations accrued 3 years thereafter. By virtue of there being no state order of custody that was rendered beforehand, the biological father had standing to commence the ¶ 1983 complaint on his behalf as well as the child's, prior to June 4th 1992. By virtue of the Supreme Court decision of Ankenbrandt rendered on June 12th 1992, the lower court permitted appellant leave to file a third amended complaint. This was done on July 8th 1992. Appellees have been unable to refute the challenge to disprove the allegation that the child was raped by the stepfather. [App. 447f-g; see page 16 of appellants brief of January 21st 1997].

By virtue of the above and all of the prior points made in the main brief of January 21st 1997, it is respectfully maintained that the case was and is with merit; that sanctions is improper; and that the case is worthy to be reinstated on behalf of the child. [2]

---

[2] A motion to stay and or "postpone" oral argument until the final opinion in *Blessing* v *Freestone* is rendered, was filed by appellant on February 3rd 1997. [FRAP 34(b)]. This was before the opposition brief was served and or filed. It is respectfully maintained that the motion is timely and warranted.

VII. "GOOD FAITH" UNDER FRCP 11 IS FULFILLED AS WELL.

The complaint was filed primarily based upon the knowledge obtained from the medical evidence indicating that the child was the victim of classic sexual abuse; culminating in rape; with the perpetrator being her former stepfather. To make certain that: the rights of both the child and father would be protected and not forever lost by virtue of the statute of limitations; a ¶ 1983 complaint was filed in federal court in 1992. This was done only after exhausting all state avenues. [judicial; executive; legislative-- App.173 et. al]. Furthermore, the permanent injuries of rape are dangerous and can be fatal, as it could lead to teenage suicide and or criminal behavior. This is precisely why Congress has passed statutes in this field, and have declared this to be of national concern. [see **Congressional Hearings: Committee on Labor and Human Resources Subcommittee on Children, Family, Drugs, and Alcoholism United States Senate, 1987 & 1991**, App. 330-332 and legislative history attached to July 8th 1992 complaint at App. 185-192].

Of extreme import, is that there is original subject matter jurisdiction by virtue of federal law, and there is no internal remedy contained in the Congressional statutes that is relied upon. Therefore, this court has the "equitable jurisdiction" to provide the proper remedy that it deems just and proper for the child. This was specifically pointed out in appellants main brief point VIII. [see pages 53-54 citing *Porter* v *Warner Holding Co.*, 328 U.S. 395, at 398 (1946) and see *Meghirg* v *KFC Western*, 116 S. Ct. 1251 at 1256 (1996) O'Conner J. citing *Middlesex County Sewarage Authority* v *National Sea Clammers*, 453 U.S. 1, at 14 (1981)]. Appellant had at all times brought up the "straightforward duty on the court" and or, the doctrine of "parens patriae". [see App. 346 quoting *Simmons* v *South Carolina*, 512 U.S. 154, at 173, 129 L.Ed. 2d 133 at 148, 114 S. Ct. 2187, 2199 (1994) Souter J., concurring; also see *Finlay* v *Finlay*, 240 N.Y. 2d 429, 434-435 (1925); *Matter of Rockland* v *Brian McM*, 602 NYS 2d 416, 419 (1993)]. The minor was brought to the court before any order of custody would have precluded Mr. Levine from requesting the appointment of a guardian ad litem. This was precisely the equitable request made at all times. [App. 229; 233; 213; 55; 403; 295-356; 137; 183; FRCP 17(a)(b)(c); main brief page 46].

Furthermore, the divorce court has no jurisdiction to determine any ¶ 1983 issue and or pendant state tort action. [see main brief pages 14,15 & 33 citing i.e. *Medlin* v *Boeing Vedrtol Co.*, 620 F. 2d 957 (CA3) (1980)]. It was necessary to proceed before any order of custody would prevent the rights of the child under ¶ 1983 to be addressed in any court. The contention raised by appellees respecting a persons "authority" to represent the child, [opposition brief page 11], is answered by the main brief; the numerous declarations and affidavits made to the district court; and on the face of the July 8th 1992 complaint itself; in support of the specific request for prospective injunctive relief for a medical examination of the child and the appointment of a guardian ad litem. The appointment of a guardian ad litem is a constitutional right recognized by other circuit courts. [see Main Brief Point IV constitutional right to guardian ad litem, citations omitted]. This is in spite of there not being one single parent having sole custody of the child prior to the complaint being filed on July 8th 1992.

The "extreme caution" standard for FRCP 11, and 28 USC § 1927, has not been adhered to. [App. 545a-c]. The lower courts decision of January 31st 1996 fails to adopt the standard of review of the second, ninth, third and seventh circuits. [See *Hadges & Kunstler* v *Yonkers Racing Corp.*, 48 F. 3rd 1320 , at 1330 (CA2) (1995) & *Keegan Management Co.*, v *Moore*, 78 F. 3rd 431, (1996) (CA9) Point X pages 55-56 of January 21st 1997 brief].

The lower court abused his discretion from the first day of oral argument in September of 1992 when he concluded in open court that 42 USC 5106a(b)(2) is "not a federal statute" [see appellants brief page 6 & App. 71]; to the day that he signed the January 31st 1996 decision and claimed that the "underlying facts are largely undisputed" [App. 542]; that the complaint sought an extension of "existing law" [App. 538]; *and ignored Senator Cochran; the NY Times: Jeanine B v Thompson; Sage; Freestone; In re Burrus; People v Ewoldt; and Lemmerman* v *Fealk*; and instead, claimed that he was being harassed by "no less than sixteen affirmations and legal memoranda with the Clerk of the Court." [App. 537-538].

CONCLUSION

For the reasons enunciated in appellants brief of January 21st 1997, and for the ones mentioned herein, appellant respectfully request that this court reverse the orders of January 31st 1996 and July 30th 1993, and remand the matter for further proceedings consistent with that determination.

Dated: New York N.Y.
February 10th 1997

Respectfully submitted,

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CONSTITUTIONAL PROVISIONS

Article I Sec. 8

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and General Welfare of the United States."

Article I Sec. 8 Cl. 18 ;

"To make Laws which shall be necessary and proper for carrying into Execution the foregoing powers."

Article III, § 2

"Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States...[emphasis added].

CONSTITUTIONAL AMENDMENTS

Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment X [1791]

The powers no delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTORY PROVISIONS

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress" .

42 U.S.C. § 5106a:

Grants to States for child abuse and neglect prevention and treatment programs.

(b) Eligibility requirements

In order for a State to qualify for a grant under subsection (a) of this section, such State shall --....

(2) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child and of any other child under the same care who may be in danger of abuse or neglect:

42 U.S.C. § 5106c:

Grants to State for programs relating to investigation and prosecution of child abuse and neglect cases.

(b) Eligibility requirements

In order for a State to qualify for assistance under this section, such State shall---
(1) fulfill the requirements of sections 5106a(b)(2) of this title.

42 U.S.C. § 5106g: Definitions

For purposes of this subchapter---

(6) the terms "Secretary" means the Secretary of Health and Human Services;

(7) the term "sexual abuse" includes---

(B) the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

42 U.S.C. § 5106a(e):

Reduction of funds in case of failure to obligate.

If a State fails to obligate funds awarded under subsection (a) of this section before the expiration of the 18-month period beginning of the date of such award, the next award made to such State under this section after the expiration of such period shall be reduced by an amount equal of the amount of such unobligated funds unless the Secretary determines that extraordinary reasons justify the failure to so obligate.

FRCP 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.....

FRCP 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) **Signature**. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper

shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,---

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.....
As amended April 22, 1993, ebl. Dec. 1, 1993.

Family Law Act § 1032. Persons who may originate proceedings

The following may originate a proceeding under this article:

(a) a child protective agency, or

(b) a person on the court's direction.

Added L.1973, c. 1039 § 9

Family Law Act § 1034. Power to order investigations

1. A family court judge may order the child protective service of the appropriate department of social services or request any other appropriate child protective agency to conduct a child protective investigation as described by the social services law and report its findings to the court:

(a) in any proceedings under this article, or

(b) in order to determine whether a proceeding under this article should be initiated.

No. 97-500

Supreme Court, U.S.
FILED
OCT 14 1997
CLERK

In The

Supreme Court of The United States

October Term, 1997

RICHARD ZELMA individually and on behalf of SHAWNE L. for the appointment of a guardian ad litem,

Petitioners,

ANDREW LEVINE, *Plaintiff,*

- against -

DONNA McLEOD, INDIVIDUALLY OR AS A STATE ACTOR; COUNTY OF WESTCHESTER; OFFICE OF THE DEPARTMENT OF SOCIAL SERVICES OF WESTCHESTER COUNTY; OFFICE OF CHILD PROTECTIVE SERVICES OF OSSINING, NY; OFFICES OF THE COUNTY ATTORNEYS OF WESTCHESTER, NY; ATTORNEY GENERAL OF THE STATE OF NEW YORK; JEWISH COMMUNITY SERVICES; MS. MARIA JOY FRANK, INDIVIDUALLY OR AS A STATE EMPLOYEE; HONORABLE ORAZIO BELLANTONI, NOMINALLY IN HIS CAPACITY AS FAMILY COURT JUDGE OF WESTCHESTER COUNTY; HONORABLE VINCENT COLABELLA, NOMINALLY IN HIS CAPACITY AS A SUPREME COURT JUDGE OF THE STATE OF NEW YORK; HONORABLE CHESTER DAVIS, NOMINALLY IN HIS CAPACITY AS A JUDGE OF THE DISTRICT COURT OF COUNTY OF FORSYTH; AND DOES 1 THROUGH 25,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF

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No. 97-500

In The
Supreme Court Of The United States

October Term 1997

Richard Zelma individually and on behalf of Shawne L. for the appointment of a guardian ad litem ,

Petitioners

Andrew Levine, Plaintiff

v.

Donna McLeod and the County of Westchester, et.al.,

Respondents

SUPPLEMENTAL BRIEF IS TIMELY

The petition for certiorari in the case at bar was filed on September 15th 1997, and docketed on September 19th 1997. [# 97-500]. The matter is pending. On October 14th 1997, this court heard arguments in the case entitled *General Electric* v *Joiner*. [# 96-188]. On September 11th 1997, the Seventh Circuits ruling in *Brophy* was rendered. *[T.W.* v *Brophy*, 1997 WL 564104, __ F. 3d. __ (1997)]. These cases are new to support the filing of this supplemental brief. [Rules of the Supreme Court ¶ 15.8.].

SUPPLEMENTAL POINTS IN SUPPORT OF PETITION FOR CERTIORARI.

I. THE FACTS DO FIT THE STANDARD FOR ADMISSIBILITY UNDER *DAUBERT*. THE **JOINER** CASE, ARGUED BEFORE THIS COURT ON OCTOBER

14TH 1997, IS NEW AND GERMANE TO THE ADMISSIBILITY OF "JUDICIALLY NOTICEABLE" EXPERT FINDINGS. THIS IS PROBATIVE TO THE CASE AT BAR FOR THE ISSUE OF SANCTIONS, AND FOR RESTORING THE CASE ON BEHALF OF THE CHILD.

What is crucial to note is that the Family Court on July 10th 1987, specifically admitted in open court that the biological father could not have raped the child, as she had testified to at the in camera hearing on that date. This was because of the medical finding by the child's doctor on December 2nd 1986, and as a result of the biological father complying with court orders of restraint as of December 1st 1986. ["C" ¶ 4 at App.* 144]. [1] The complaint of July 8th 1992, [¶ 44 at App*. 153], set forth, in part, the relevant decision rendered from the bench on July 10th 1987:

> 44: "There was a stipulation that if Dr. Robert Schwartz were to testify and was called as a witness, that he would testify as to the information in his report. This is important, because I must make a finding as to what acts under the penal law, were committed as far as rape goes. I know that she did indicate that when questioned by the Law Guardian on the in camera interview that *daddy* put his penis in her vagina and it hurt, but there was an examination after the alleged incident occurred, and as far as any sexual intercourse is concerned.... there was no evidence of any kind of sperm in the vagina area or there was no evidence of penetration, so with respect to the finding of rape I will rule it out."[emphasis added "C" 44 at App*. 153; and App* 47-48].

Mr. Belvedere Esq., submitted several affidavits stating that at no time did the child ever identify anyone by name at the in camera hearing of July 10th 1987. ["A" 52-56]. The Family Court judge never indicated or suggested

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[1] "C" refers to the third amended complaint dated July 8th 1992. App* refers to record from # 96-7747. "A" refers to appendix in the petition for certiorari.

that the child identified anyone by name at the in camera hearing, or at any other time. [App.* 37-51].

The relevant point from The Handbook of Clinical Intervention by Dr. Sgroi, are that clinical findings demonstrate that sexual abuse "progresses" from a mild form; to a physical form; with it culminating in actual "vaginal penetration". This is "predictable". In paragraph 71 of the July 8th 1992 complaint, the findings of Dr. Sgroi are set forth in specific detail:

> (2) The engagement phase does encompass a *progression* of equal activity. [App.* at 158-160, citing Handbook of Clinical Intervention page 15].
> (4) *It is very helpful to think of sexual abuse on a continuum over time*. [*id* at p. 17].
> (5) The *progression* of exposure to fondling to some form of penetration is very predictable. [*id* . at p. 15].
> (6) Secrecy is essential. The perpetrator must persuade or pressure the child to keep their activity a secret over time. [*id*. at p. 16]
> (8) Family members are often aware of abuse and partake in the secret. [*id*. at pages 357-358].
> (12) Accidental Disclosure. In this type of disclosure, the secret was revealed accidentally, because of external circumstances. The key factor here is that none of the participants decided to tell the secret. Instead the secret was revealed in one of the following ways:
>
> > (a) Observation by a third party. Someone else observes the participants and tells someone else.
> > (b) Physical injury to the child. When this occurs, it is usually not intentional. However, the signs of the injury draws outside attention to the sexual behavior. [*id*. at page 90 emphasis added]."

This is precisely what the evidence from the underlying 1987 hearing establishes. The child's statements

to the investigators and former law guardian, from December 5th 1986-April of 1987, demonstrates a progressive abuse with it worsening over time. It further demonstrates a secrecy being imposed. Thereafter, on July 10th 1987, the child for the first and only time, testifies to actual vaginal penetration by a "daddy".

Of significant evidentiary import, is that the child was taken to the emergency ward at a local hospital for physical injuries that she had sustained. This was on December 26th 1986. ["C" ¶ 6 at App.* 144-145]. The physical and verbal abuse taking place before the nurses on duty at this hospital, was documented. [*id.*]. The person causing the abuse and who accompanied the child to the hospital was arrested that day. Here lies the "accidental disclosure" that Dr. Sgroi speaks of in her clinical handbook. Subsequently, appellee McLeod arrested the same stepfather on July 2nd 1987. [App* 233a - 234a].

The facts elicited from the child over a "continuum", coupled with the clinical findings of Dr. Sgroi, fully support a viable cause of action under the Child Abuse Prevention and Treatment Act. This is for the immediate "investigation and prosecution" of the perpetrator, who allegedly raped and otherwise sexually abused the child from December 1986 through July of 1987. [42 USC 5106a(b)(2) and 5106c(b)(1) & 5106g (7) (B); Point I & II of petition for certiorari]. This especially holds true when appellees were notified on December 7th 1987, by medical professionals, of this probability. They were made aware that to ignore this, would increase the harm to the child. [page 9 of petition for certiorari].

Petitioner had at all times relied on the *Clinical Handbook of Child Abuse by Dr. Suzanne Sgroi*. This is a published book on the subject and was "judicially noticeable" by the New York Court of Appeal as the leading authority on the subject in 1989. [*Matter of Nicole V.* 71 NY 2d 112, at 121 (1989) "C" 70 at App. * 158 citing Handbook of Clinical Intervention in Child Sexual Abuse, by Dr. Sgroi, (1982); quote from *Daubert* v *Merrell Dow*, 509 U.S. 579, at 598 (1993) Rhenquist and Stevens J.J.

concurring in part and dissenting in part].

The facts are not "undisputed" as the trial court held in its decision of January 31st 1996. ["A" 25 at page 13 of petition for certiorari dated September 11th 1997 citing *Levine v County of Westchester*, 164 F.R.D. 372 (S.D.N.Y. (1996)]. The allegation that the child was raped and otherwise sexually abused by her stepfather from December 1986 through July 10th 1987, has at all times been the core to the dispute. The medical clinical findings of Dr. Sgroi are admissible. [*Daubert* v *Merrell Dow*, 509 U.S. 579, at 593-594, (1993); FRE 702 & 803 (18) and (24)].

This courts ruling in *Daubert* has at all times been relied upon by petitioner. [see i.e. App. * 334 proposed petition for certiorari dated August 8th 1994]. In 1994, it was noted that the clinical findings from Dr. Sgroi would be relevant and admissible to all members of this court. [App*. 334 citing *Daubert* v *Merrell Dow*, *supra* at 598.]. The "scientific knowledge" of Dr. Sgroi, supports the " inference or assertion" or allegation, that the child was sexually abused with it culminating in actual vaginal penetration. [*Daubert* v *Merrell Dow*, 509 U.S. 579 at 590 (1993)]. The published handbook and clinical findings " assist the trier of fact to understand the evidence or to determine a fact in issue." [*Daubert id*. at 591 quoting FRE 702]. When one links the testimony of rape of July 10th 1987, with a person merely identified as a "daddy", the federal statutory right for an "investigation" and prosecution of the alleged perpetrator, under ¶ 1983, is actionable. [2] [See 42 U.S.C. ¶ 5106a (b)(2); see Point I, II, & III of petition for certiorari docketed September 19th 1997, # 97-500].

This courts ruling in Joiner may be highly probative. [*General Electric Co.* v *Joiner*, cert. granted, 117 S. Ct. 1243, (1997), docket # 96-188, argued October 14th 1997; appealing *Joiner v General Electric* 78 F. 3rd 524 (1996)].

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[2] The clinical handbook was ignored and returned to petitioner by the trial court in 1992.

Petitioner maintains that the alleged facts had full evidentiary support. This is a complete defense under FRCP 11. [see FRCP 11 (b) (3) as amended 1993]. It further supports the point that there was a viable federal cause of action under 42 USC 5106a(b)(2), which is enforceable under ¶ 1983 for the third party beneficiaries. [see Points I; II; and III of petition for certiorari].

II. PETITIONER DOES HAVE PROPER STANDING TO PRESENT THE FACTS OF THIS CASE ON BEHALF OF THE SUBJECT CHILD. UNLIKE THE SEVENTH CIRCUIT COURT'S RECENT DECISION IN *T.W.* V. *BROPHY*, PETITIONERS APPEAL IS "CONCRETE", NOT AN "IDEOLOGICAL STAKE". THE APPOINTMENT OF A GUARDIAN AD LITEM IS WARRANTED.

The new case law rendered by the Seventh Circuit on September 11th 1997, discusses whether a party can bring a case on behalf of a child as her "next friend". [cf. *T.W.* v *Brophy*, 1997 WL 564104, __ F. 3d. __ (CA7)]. The Seventh Circuit relied in part on this court's opinion of 1990, in its discussion of FRCP 17 (c). [*Whitmore* v *Arkansas*, 495 U.S. 149 (1990)].[3]

The case at bar is unlike *Whitmore*. The injury to petitioner is not "too speculative to invoke the jurisdiction of an Art. III court". [Cf. *id*. at 157 (1990)]. There was no definitive positive result for petitioner Whitmore, had his argument benefited the 3d party prisoner Simmons. In the present case, the opposite is true. If the complaint and appeal were properly based upon relevant admissible facts, and accurately relied upon "existing law", then, this would be both a defense to sanctions for petitioner, and directly support the restoration of the case for the real party of

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[3] However, the Seventh Circuit affirmed the dismissal of the federal complaint based upon the attack of the state court judgment of custody. The Circuit Court dismissed the appeal based upon this "independent ground". [Cf. petition for certiorari to this court pages 9-12].

interest, Shawne L. [cf. *Whitmore, id.* at 157].

Moreover, the complaint was brought on the-child's behalf with full authority from the biological father to do so. ["A" 65-66, correspondence from Levine dated April 13th 1994]. And, of significant import, is that there is *a conflict of interest* present at bar, between the child and appellees. It is alleged that all of the sexual abuse only transpired after the restraining orders were obtained, and that each of the appellees had duties to investigate this premise once they were informed by medical professionals on the subject. This conflict reached its peak when the former law guardian submitted an arguably false affidavit to the district court on August 4th 1992, claiming that the child had identified Mr. Levine by name on July 10th 1987. [App. * 254 § 13 re: affidavit of appellee Frank]. This was not supported by the former law guardian's own previous statement made on July 10th 1987, when she stated that the child was "somewhat vague". [see petition for certiorari page 7]. Indeed, this was refuted on numerous occasions by a person having personal knowledge of the events at that very *in camera* hearing. [see affidavits of Mr. Belvedere Esq. attached to petition for certiorari at "A" 52-56].

The appointment of a guardian ad litem was initially requested in the complaint of July 8th 1992. This same request was subsequently made through a cross-motion by petitioner on December 31st 1994.[4] [App.* 403]. Such an

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[4] " The case was abandoned by Mr. Levine on July 15th 1994. The lower court rendered its order regarding this issue on December 22nd, not November 29th 1994, as it states in its decision." [see Point VII page 52 of Main Brief to Circuit Court dated January 21st 1997; please see page 13 of petition for certiorari and "A" at page 19]. Moreover, the motion for sanctions was filed on December 14th 1994. [App.* 425]. Thus, it is of legal import that petitioners motion[s] were filed on December 31st 1994. It would not have been timely for a re-hearing, had the order respecting the date of abandonment been filed on November 29th 1994. However, it was filed within 10 days of December 22nd 1994. [FRCP 59 (b) "A"28-29]. The cross-motion to sanctions for the appointment of a guardian ad litem, and for consolidation, was furthermore timely, as it was within 20 days of

appointment is fully supported by the Seventh Court ruling of September 11th 1997 when a "conflict of interest" is raised; as well as the 5th Circuit when it found that such an appointment was a constitutional "predicate". [see *T.W.* v *Brophy*, 1997 WL 564104, __ F. 3d __, citing *In re Chicago, Rock Island & Pacific R.R.*, 788 F. 2d 1280, 1282 (CA7) (1986); and please see *Chrissie F. I*, 883 F. 2d 25 (CA5) (1989) & *Chrissie F.* v *Miss. Dep't of Public Welfare*, 995 F. 2d 595. at 599 (1993) cert. denied, 114 S. Ct. 472 (1994); at page 29 of petition for certiorari].

It appears that the child's rights for the appointment of a guardian ad litem are properly presented for this court's consideration. She was at all times brought to the courts attention through her biological father. There was no decree of custody by a state court on July 8th 1992. [see petition for certiorari pages 9-13]. She is legally disabled. She is the real party of interest. Her "independent" rights are fully supported by reliable admissible evidence and cannot be abandoned. [see Point IV pages 29-30 of petition for certiorari dated September 11th and filed September 15th 1997].

It is the petitioners "work product" that seeks to protect her. In addition, it as an affirmative defense to the question of whether the case was frivolous and or with merit. The request for the appointment of a guardian ad litem on the child's behalf was at all times made. It was a question presented in the proposed petition for certiorari of August 8th 1994. [see App.* 317 question # 6]. It is a question that is now presented as well. [question # 7 to petition for certiorari docketed September 19th 1997]. It is error to dismiss the case with prejudice against the child. This is of significant import. And, it is error to punish conduct that is

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December 14th. [FRCP 12 (a) & (g)]. These motions were never addressed by the trial court. No notice of appeal could have been filed. [FRAP 4 (a) (4) (iv)]. The biological father abandoned the case and child on July 15th 1994. Petitioner was unable to file a petition for certiorari to this court on August 8th 1994 on behalf of the child. This was readily acknowedged by the trial court on May 5th 1995. [App.* 117 lines 4-12].

proper; legal; and fully supported by existing law when it was initially brought. This is in sharp contrast to the ruling by this court. [*BMW* v *Gore Jr.*, 116 S. Ct. 1589, (1996)].

The "reasonable inquiry" in making certain that the facts are "well grounded", coupled with the proper analysis of the statutory language and case authority, each of which are defenses for purposes of FRCP 11, is intertwined with the rights of the child herself and whether there was a proper cause of action brought on her behalf. It appears that petitioner has legal standing, as set forth by this court. [*Whitmore* v *Arkansas*, *supra. at 163-164* (1990)].

As was set forth in Point IX to the petitioners brief to the Circuit Court on January 21st 1997:

> The "work product" by appellant as exemplified by the August 8th 1994 proposed petition for certiorari, does fit the legal definition for such status, as it was exclusively prepared in anticipation for further litigation. The child is still entitled to its protection. [See i.e. *Griffith* v *Davis*, 1995 WL 361063, 161 F.R.D.687 (1995)]. The proposed petition for certiorari was exclusively prepared "for litigation". It fulfills the requirements of FRCP 26 (b)(3). [Cf. *In Re Bairnco Corporation Securities Litigation*, 148 F.R.D. 91, 102-103 (S.D.N.Y. 1993); also see *Westinghouse Electric Corp.*, v *Republic*, 951 F. 2d 1414, at 1428 (1991) (CA3), App[*] 470-474]. As has at all times been made clear, appellant would not have commenced this action but for the child. There can be no argument that appellant has waived its disclosure. It remains to be a part of litigation which was at all times brought on the child's behalf. [i.e. *Samuels* v *Mitchell*, 155 F.R.D. 195, 200-201 (N.D. Cal. 1994)].

[see Point IX pages 54-55 of Main Brief to Circuit Court dated January 21st 1997].

CONCLUSION

As the justices of this court have stated: *"Differences in circumstances beget differences in law."* [*Jackson* v *Metropolitan Edison Co.* 419 U.S. 345 at 358 (1974) citing *Burton* v *Wilmington Pkg. Auth.*, 365 U.S. 715 at 726 (1961)]. *"One may call it a question of fact if one will, for it is from the fact that law emerges. Ex Facto jus oritum."* [See *The Paradoxes of Legal Science*, *by* Cardozo, published (1928) by Columbia University Press page 24, 25]. *"It is familiar that what is due process of law depends on the circumstances. It varies with the subject and necessities of the situation."* [*Moyer* v *Peabody*, 212 U.S. 78 at 84 (1909) Justice Holmes].

It is respectfully requested that the petition be granted and a writ of certiorari be issued.

Dated: New York N.Y.

Respectfully submitted,

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October 14th 1997